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Religious Expression, Government Funds, and the First Amendment

Suart J. Lark
Holme Robert & Owen LLP

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Stuart J. Lark[*]

[*] Attorney, Holme Roberts & Owen LLP in Colorado Springs, CO; J.D., University of Chicago; M.S., Stanford University; B.S., Purdue University. Mr. Lark wrote this article while serving as Counsel for Legislative Affairs and Appellate Advocacy with Christian Legal Society in Washington, D.C..

I. INTRODUCTION

After keeping faith-based organizations in exile for many years, the government is now taking steps to welcome them into the land of government-funded programs. But even though the border may be open, faith-based organizations are still likely to encounter trouble within. One primary source of trouble arises in government programs that prohibit organizations from engaging in certain types of religious expressive activities with government funds. Such restrictions take a variety of statutory and regulatory forms. For instance, the so-called "charitable choice" provisions, which have been applied to a range of grant programs in recent years, prohibit any government funds from being expended for "sectarian worship, instruction, or proselytization."[1] Restrictive pro-

[1] 42 U.S.C.A. § 300x-65(i) (West Supp. 2002) (Substance Abuse And Mental Health Services Act); 42 U.S.C. § 9920(c) (Supp. V 1999) (Community Services Block Grants); 42 U.S.C. § 604(a)(j) (Supp. V 1999) (Temporary Assistance to Needy Families). Property acquired with Community Development Block Grant (CDBG) funds may not be used for "religious purposes or [to] otherwise promote religious interests. This limitation includes the acquisition of property for ownership by primarily religious entities." 24 C.F.R. § 570.200 (j)(1) (2002). Further, in providing services with CDBG funds, primarily religious entities must "provide no religious instruction or counseling, conduct no religious worship or services, engage in no religious proselytizing, and exert no other religious influence in the provision of such public services." 24 C.F.R. § 570.200 (j)(3)(iii) (2002). Grants recently made by the Department of Labor to small faith-based and community organizations for workforce development programs were subject to the condition that no funds could be used for "instruction in religion . . . worship, prayer, proselytizing, or other inherently religious practices." Grants for Small-Faith-Based and Community-Based Non-Profit Organizations, 67 Fed. Reg. 32,016 (May 13, 2002); *see also* 29 U.S.C. § 2938(a)(3) (2000).

visions such as these, if not properly defined, will send many faith-based organizations back into exile.

As an initial matter, religious expression restrictions in government programs are virtually impossible to apply consistently. This difficulty arises in part from the fact that terms such as "sectarian worship, sectarian instruction, and sectarian proselytization" have different meanings for different religious organizations based on their particular theological views regarding the nature of their activities. In addition, religious organizations incorporate religious content into their activities in a variety of ways.

Administrative agencies and the courts may resolve this ambiguity through administrative guidance and case law, but when they look to the United States Supreme Court for guidance, they will discover that the Court appears to have backed itself into a corner. On the one hand, the Court has ruled that private recipients of government funds have free speech rights. Further, when construed broadly, religious expression restrictions constitute viewpoint discrimination and improperly single out religion for adverse treatment. On the other hand, the Court has held that the Establishment Clause prohibits direct government funding of at least certain types of private religious expression in certain contexts.

There is, fortunately, a way out. A close reading of the Court's Establishment Clause cases reveals that the Court has, in fact, never required a broad construction of religious expression restrictions in religiously neutral government aid programs. Therefore, interpretive guidance based on a narrow construction, one that only applies to religious expression outside the scope of a government program, minimizes the risk of a constitutional violation.[2] Indeed, a narrow construction reflects the fundamental principles underlying the Religion Clauses: neutrality with respect to religion and respect for the religious expression that constitutes an essential component of the identity of many individuals and faith-based organizations. Government policy based on these principles will fulfill the welcome promised to faith-based providers.

Part II of this article discusses the difficulties that arise in attempting to define and apply the religious expression restrictions. This part identifies two possible constructions of the restriction language, one narrow and one broad, that address the key difficulties. Parts III and IV examine how these construc-

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Similarly, the facilities grant program upheld in *Tilton v. Richardson*, 403 U.S. 672 (1971), excluded any facility that was to be used for "sectarian instruction or as a place for religious worship . . . ." *Id.* at 675 (quoting 20 U.S.C. § 751(a)(2) (1964 & Supp. V) (repealed 1972)). A more general grant program upheld in *Roemer v. Board of Public Works of Maryland*, 466 U.S. 736, 740-41 (1976), prohibited grantees from using any grant moneys for "sectarian purposes." The school aid program upheld in *Mitchell v. Helms*, 530 U.S. 793, 849 (2000), prohibited any aid from being used for "religious worship or instruction."

[2] The United States Supreme Court has stated that "when there are two reasonable constructions for a statute, yet one raises a constitutional question, the Court should prefer the interpretation which avoids the constitutional issue." Legal Serv. Corp. v. Velazquez, 531 U.S. 533, 545 (2001). The same principle applies to the administration of a statutory program.

tions implicate First Amendment principles of free speech, free exercise, and nonestablishment. Part V and the Appendix identify several additional implementation considerations related to restrictions on private religious expression and present sample regulations applying a narrow construction of such restrictions.

II. DEFINITIONAL AMBIGUITY AND INTERPRETIVE GUIDANCE ALTERNATIVES

A. *Interpretation Difficulties*

A number of ambiguities arise when seeking to interpret and apply the religious expression restrictions to the various types of religious expressive activities. These ambiguities can be grouped into the following categories.

1. Religious Perspectives and Approaches

Several government funded activities challenged in a recent case help illustrate the issues related to religious perspectives on government program objectives. The case, *American Civil Liberties Union of Louisiana v. Foster*,[3] involved the use by private organizations of funds distributed by the state under a federal program that allocates funds for teaching and promoting sexual abstinence among youth. The challenged activities included: (1) a chastity program entitled "God's Gift of Life;" (2) radio programs teaching on abstinence in relation to the Virgin Birth and God's plan for sexual purity; (3) skits that promote abstinence based on the life and teaching of Jesus; (4) a religious youth revival challenging attendees to make a religious commitment and to abstain from sex based on teachings in the Bible; (5) the purchase of Bibles and other religious materials as resources for an abstinence program; and (6) prayer sessions at abortion clinics and pro-life rallies.[4]

All of the challenged activities undoubtedly include religious content. However, in varying degrees, each of the activities also advances the government's objective of teaching or promoting abstinence. The question for faith-based organizations and government officials, then, is whether in each case the activity constitutes impermissible sectarian instruction or permissible instruction on abstinence from a religious viewpoint.

More generally, it may be assumed that "sectarian instruction" encompasses instruction on religious doctrine solely for the purpose of advancing a particular religious sect. But an organization may also engage in instruction on a government program topic from a religious perspective or with some religious content (e.g., teaching on self-esteem rooted in God's love as a key to overcoming the temptation to engage in sexual conduct for social approval). Further, the

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3 No. 02-1440, 2002 WL 1733651 (E.D. La. July 24, 2002).

4 *Id.* at *3-*6.

content may be very generic (e.g., "God is love and we all share in that love"), or it may be very specific (e.g., "God's love is demonstrated through the death and resurrection of Jesus").

Similarly, the term "sectarian worship" might clearly apply to a weekly worship service. It is unclear, however, whether the term also encompasses religious activities such as prayer conducted in furtherance of government program objectives (and whether it makes a difference if the prayer is generic or specific, or whether it is clearly prayer and not merely meditation). For instance, a counselor might pray with an individual for strength to overcome temptations and peer pressure to engage in sexual activity. The extent to which such instruction or worship should properly be considered sectarian instruction or worship, or simply instruction and counseling from a religious viewpoint, is not self-evident, particularly in light of the constitutional issues discussed in Parts III and IV, *infra.*

2. Internal or Incidental Expression

A faith-based organization that refrains from engaging in any organized activity with the public that includes expressly religious content may still incorporate religious content into its internal activities. For instance, it is easy to imagine that the employees and volunteers of the faith-based organizations challenged in *Foster* engage in times of prayer (both organized and personal) for their activities and the youth they are trying to reach. They might also study religious teaching related to sexual abstinence (and to other aspects of life), and may display religious messages at their workplace.

Likewise, many of an organization's activities may include an incidental amount of uniquely religious content as part of the overall program. This content may or may not have a direct bearing on the objectives of the program. As an example, an organization that builds houses for the poor with a combination of paid and volunteer workers might begin each workday with a prayer. Similarly, the organization may expect that its employees and volunteers will share their faith "informally" with prospective residents in the course of their house construction activity. And regardless of any such expectation, employees and volunteers of faith-based organizations would generally welcome the opportunity to discuss religious matters with individuals who initiate discussion of such matters with them.

The extent to which these activities (which shall be referred to herein as "incidentally religious activities") constitute "sectarian worship, instruction or proselytization" is unclear. The application is complicated by the fact that both private and government employees enjoy broad rights to bring their religious practices into the workplace.[5] It would seem odd to conclude, as a strict reading

[5] *See* 42 U.S.C. § 2000e(j) (1994) (requiring private employers to accommodate the religious practices of their employees unless doing so creates an "undue hardship" on the employer); THE WHITE HOUSE, GUIDELINES ON RELIGIOUS EXERCISE AND RELIGIOUS EXPRESSION IN THE FEDERAL

of the language might indicate, that employees of private organizations receiving government funds may engage in less religious activity than government employees.

3. Subjective Perspective

Many religious persons engaged in instruction with no express religious content nevertheless consider the instruction to be religious in nature on the doctrinal premise that all knowledge comes from God. For such persons, it simply makes no sense to distinguish between teaching on sexual abstinence (which that person believes to be a part of the design of God for humans created to reflect his character), and teaching on the character of God (e.g., on God's purity and holiness). Persons holding such religious views might conclude that all of their activities constitute "sectarian instruction," particularly if they could be held liable for an interpretation with which a judge subsequently disagrees.

Similarly, a religious organization may, as a matter of doctrine, hold that all of its activities constitute "worship." For example, some faiths teach that serving the poor is a way of serving God, which is, in turn, an act of worship. On this basis, religious organizations may rightly assert in other legal contexts that their activities constitute religious worship. For instance, property tax exemptions in some states turn on whether the subject property is being used exclusively for religious worship (or religious "purposes").[6] From this perspective, an organization's representation that its activities do not constitute religious worship for charitable choice purposes may appear inconsistent with the position the organization has taken for property tax exemption purposes.[7]

WORKPLACE (1997), *available at* http://oeeo.psc.gov/oeeo/l2r_1.html [hereinafter WORKPLACE GUIDELINES] (acknowledging that federal employees may engage in religious expression in many work situations).

6 *See, e.g.*, COLO. REV. STAT. § 39-3-106 (2002).

7 The inconsistency could be resolved by reference to whether the applicable reason for defining "religious worship" is to accommodate or restrict religious expressive activity. For instance, in the property tax context, courts have held that reliance on the bona fide subjective perspective of a religious organization is appropriate. *See* Maurer v. Young Life, 779 P.2d 1317 (Colo. 1989). In other words, religious organizations may qualify for property tax exemptions in part based on their subjective doctrinal perspective on their activities. *See* East Asian Bay Local Dev. Corp. v. State, 13 P.3d 1122 (Cal. 2000) (upholding an exemption in a state landmarking law for any property owned by a religious organization when such organization asserts that a landmarking scheme would deprive it of appropriate use of the property in furtherance of its religious mission). By way of contrast, in the charitable choice context, where the term is used to restrict expressive activity, an objective standard is necessary to avoid penalizing organizations for their internal religious motivations. Indeed, many religious organizations could only represent that any of their activities do not constitute religious worship if the term is understood from an objective perspective. However, in the absence of a clear distinction in the law as to when a subjective or an objective standard applies, such representations may appear directly contradictory both to the religious organizations and/or to a property tax assessor or a court.

The term "sectarian proselytization" raises some of the same issues as sectarian worship. Some religious organizations consider all of their activities to be part of the evangelism process. Even activities without any externally identifiable religious content (e.g., tutoring on science classes) may constitute "pre-evangelism" for some religious organizations (and they may portray it as such when communicating with their constituencies). Therefore, it may be difficult for these organizations to conclude that they are not engaged in proselytization with respect to such activities.[8]

In this regard, some statutes and regulations prohibit any use of government funds for religious *purposes*.[9] The use of the term "purpose" in this context is particularly confusing since it fails to distinguish between objective outcomes and underlying motivations (or broader intentions). In fact, the word can refer both to a desired outcome and to an internal reason for engaging in an activity. Accordingly, a religious organization may conduct an addiction recovery program for two purposes: to help people overcome addiction and to serve God's command to help people (or to establish relationships that may lead to subsequent evangelism opportunities). Even if the addiction recovery program contains no objective religious content, it may still be difficult for the religious organization to conclude or represent that it is not conducting the program for religious purposes. For the foregoing reasons, the term "purpose" should not be used with respect to restrictions on religious expression.

4. Sectarian Versus Religious

The restricted activities of worship, instruction and proselytization are predicated by the term "sectarian" instead of "religious," perhaps implying that the restrictions do not apply to religious activities which are not also sectarian. However, this distinction would almost certainly fail constitutional scrutiny. The Court has long recognized the constitutional perils that arise when the government seeks to distinguish among religious expression based on its religious quality. In *Fowler v. Rhode Island*,[10] the Court struck down a city ordinance that permitted churches and similar religious bodies to conduct worship services in its parks, but prohibited religious meetings. The Court held that the govern-

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8 Just as a representation that certain activities do not constitute religious "worship" may jeopardize a religious organization's property tax exemption, a representation that activities do not constitute proselytization (or worship or sectarian instruction) may jeopardize a religious organization's exemption from certain state religious nondiscrimination laws that only apply to the religious activities of religious organizations. *See, e.g.*, KY. REV. STAT. ANN. § 344.090 (2) (Michie 1997) (providing exemption only for work connected with the carrying on of the religious activity of a religious organization). *But see* Montrose Christian Sch. Corp. v. Walsh, 770 A.2d 111 (Md. 2001) (holding that religious employer exemption limited to religious activities violates Free Exercise Clause).

9 *See supra* note 1.

10 345 U.S. 67 (1953).

ment cannot distinguish between a "sermon" delivered at a "worship service" and an "address" at a "religious meeting."[11] The Court stated:

> [t]o call the words which one minister speaks to his congregation a sermon, immune from regulation, and the words of another minister an address, subject to regulation, is merely an indirect way of preferring one religion over another. [12]

Similarly, the Court has rejected a proposed distinction between "religious worship" and other forms of religious expression, observing that "the distinction [lacks] intelligible content," and that it is "highly doubtful that [the distinction] would lie within the judicial competence to administer."[13] The Court stated that

> [m]erely to draw the distinction would require the [state]—and ultimately the courts—to inquire into the significance of words and practices to different religious faiths, and in varying circumstances by the same faith. Such inquiries would tend inevitably to entangle the State with religion in a manner forbidden by our cases.[14]

The same can be said with respect to an inquiry into whether particular expression is "sectarian" or merely "religious."

B. Possible Constructions of the Religious Expression Restrictions

The definitional ambiguities associated with religious expression restrictions arise in large part from the variety of ways in which faith-based organizations incorporate religious expression or significance into their activities. The ambiguities discussed in the latter two categories above can be resolved without significant controversy. With respect to the subjective perspectives issue, government officials and the courts should clarify that no expression shall be restricted based solely upon an organization's subjective characterization of the expression. Further, the term "sectarian" should be deemed to be synonymous with the term "religious."

The following distinction between different types of activities containing religious expression provides a basis for resolving the remaining ambiguities.

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11 *Id.* at 69-70

12 *Id.*

13 Widmar v. Vincent, 454 U.S. 263, 269 n.6 (1981).

14 *Id.* at 269-70 n.6

1. *Exclusively Religious Activities.* Exclusively religious activities consist of those activities of a religious organization that are not primarily directed toward any particular objective related to the government-funded program. Any benefit arising from these activities with respect to the immediate objectives of the government program is solely an incidental by-product of the religious quality of the activities. A religious organization engages in exclusively religious activities even if it is not pursuing any particular government program objectives. For instance, a church worship service would constitute an exclusively religious activity. Certain individuals might find strength to overcome addiction by attending a church worship service, but such services are generally not directed toward this particular objective.

2. *Integrated Religious Activities.* These activities are directed toward identifiable objectives of a government-funded program and include uniquely religious content as a means of accomplishing these objectives. For instance, the chastity program, radio program and skit challenged in *Foster* would probably constitute integrated activities since, on the information provided, they appear to be directed primarily toward advancing the government's objectives.[15] Similarly, the use of prayer in an addiction counseling program to promote discipline or overcome emotional barriers would constitute an integrated activity.[16]

Based on this distinction, two possible constructions of the charitable choice religious expression restrictions (and similar restrictions), one narrow and one broad, help resolve the remaining definitional ambiguities discussed above. The narrow construction would prohibit only those exclusively religious

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15 *See supra* notes 3-4 and accompanying text.

16 The religious content in integrated activities may be divided into that which is "merely informative" and that which is directed toward spiritual development. It has been argued that religious expression restrictions may permit the former type, but should always prohibit the latter type. *See* Ira C. Lupu & Robert Tuttle, *The Distinctive Place of Religious Entities in Our Constitutional Order*, 47 VILL. L. REV. 37, 87 (2002) (arguing that religious organizations should not be permitted to use government funds for activities that involve "religious transformation," even if such transformation accomplishes the program objectives). Such a result would disqualify many faith-based organizations because their integrated activities include expression directed toward spiritual development. More importantly, this article argues that prohibiting private expression based solely on its religious quality raises serious free speech and free exercise issues and is not required by the Establishment Clause. Because the distinction does not resolve the key First Amendment issues discussed in this article, the term "integrated activities" includes religious expression directed toward spiritual development.

activities that are outside the scope of the government program.[17] The broad construction would prohibit not only all exclusively religious activities, but also all integrated religious activities.

With respect to many government programs, virtually all exclusively religious activities (except incidentally religious activities to the extent employees and volunteers could engage in similar nonreligious activities) would be outside the scope of the program. In the *Foster* case, it is possible that additional facts would demonstrate that the youth revival meeting and religious materials are not adequately focused on promoting abstinence and, therefore, are outside the scope of the program. The same conclusion appears likely with respect to the prayer meetings at abortion clinics and pro-life rallies. However, certain types of government programs with very broad purposes might encompass at least some exclusively religious activities. As discussed below, the premise underlying a narrow construction is that religious content or viewpoints in activities that further the objectives of a government program cannot properly be attributed to the government as an endorsement of religion, provided that such activities are funded without regard to their religious content.

The broad construction does not consider the extent to which religious content might actually further the objectives of the government program. The premise underlying this construction is that the religious content in any expression funded with direct cash payments is necessarily attributable to the government as an endorsement of religion, even if the expression is funded without regard to such religious content.[18] As argued in Parts III and IV, this premise overstates the Supreme Court's Establishment Clause jurisprudence and results in substantial infringement of the free speech and free exercise rights of religious organizations.

III. BROAD RESTRICTIONS ON PRIVATE RELIGIOUS EXPRESSION IN THE PERFORMANCE OF GOVERNMENT-FUNDED PROGRAMS VIOLATE THE FREE SPEECH AND FREE EXERCISE CLAUSES

A. *A Broad Construction of the Restricted Religious Expression Constitutes Viewpoint Discrimination*

In those cases where the Court has specifically examined governmental restrictions on private religious expressive activity, it has held that such restric-

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[17] Accordingly, a narrow construction would permit integrated and incidentally religious activities.

[18] A strict application of this premise would also prohibit incidentally religious activities. A moderate application might permit such activities provided the religious content is *de minimis* in nature such that no cost of the program would normally be attributed to the content. But even assuming incidentally religious activities were permitted under a broad construction, this construction would still suffer from the constitutional infirmities discussed in this article. The same result applies with respect to the "merely informative" integrated activities discussed *supra* in note 16.

tions constitute viewpoint discrimination. In *Good News Club v. Milford Central School*,[19] the Court struck down a provision in an elementary school's community use policy that prohibited use "by any individual or organization for religious purposes."[20] The Court noted that the policy permitted use for "a variety of purposes, including events pertaining to the welfare of the community."[21] Pursuant to the policy, "any group that promote[d] the moral and character development of children [was] eligible to use the school building."[22]

The controversy in *Good News Club* arose after some community residents applied for permission to use a school classroom after instructional hours for a Bible club. The school argued that the activities of the club, which consisted of singing religious songs, praying, memorizing Bible verses and discussing a Bible lesson and its life application, were "religious in nature" and "different in kind" from other activities permitted by the school.[23] Further, the school argued that the club engaged in an "additional layer" of "quintessentially religious" activities that are "focused on teaching children how to cultivate their relationship with God through Jesus Christ."[24] The school sought to distinguish these activities from "pure moral and character development."[25]

The Court rejected these arguments. Concluding that "the [club] seeks to address a subject otherwise permitted under the rule, the teaching of morals and character, from a religious standpoint," the Court held that the exclusion of the club based on its religious nature "constitutes unconstitutional viewpoint discrimination."[26] The Court expressly disagreed with the proposition "that something that is 'quintessentially religious' or 'decidedly religious in nature' cannot also be characterized properly as the teaching of morals and character development from a particular viewpoint."[27] The Court noted that there is "no logical difference in kind between the invocation of Christianity by the Club and the invocation of teamwork, loyalty, or patriotism by other associations to provide a foundation for their lessons."[28]

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19 533 U.S. 98 (2001).

20 *Id.* at 103 (quotation omitted).

21 *Id.* at 108 (quotation omitted).

22 *Id.* (quotation omitted).

23 *Id.* at 110-11.

24 *Good News Club*, 533 U.S. at 111 (internal quotation omitted).

25 *Id.* (quotation omitted).

26 *Id.* at 110.

27 *Id.* at 111.

28 *Id.* The narrow construction can be implemented in a manner consistent with the Court's observation that "quintessentially" or "decidedly" religious activities are not necessarily outside the scope of a speech forum. In *Good News Club*, the applicable forum was defined in very broad terms (e.g., "teaching of morals and character development"). However, nothing in *Good News Club* indicates that in much more narrowly defined social service programs, many exclusively

Similarly, in *Lamb's Chapel v. Center Moriches Union Free School District*,[29] the Court held that a policy permitting community use of school facilities for "social, civic, or recreational uses," but not for "religious purposes," constitutes viewpoint discrimination as applied to "a film series dealing with family and child-rearing issues faced by parents today."[30] The Court concluded that "it discriminates on the basis of viewpoint to permit school property to be used for the presentation of all views about family issues and child rearing except those dealing with the subject matter from a religious standpoint."[31]

In *Rosenberger v. Rectors and Visitors of the University of Virginia*,[32] the Court struck down a restriction in a public university student club funding policy pursuant to which the university denied funding to a religious student publication.[33] The restriction excluded activities that "primarily promote[] or manifest[] a particular belie[f] in or about a deity or an ultimate reality."[34] The Court noted that the policy

> does not exclude religion as a subject matter but selects for disfavored treatment those student journalistic efforts with religious editorial viewpoints. Religion may be a vast area of inquiry, but it also provides, as it did here, a specific premise, a perspective, a standpoint from which a variety of subjects may be discussed and considered. The prohibited perspective, not the general subject matter, resulted in the refusal to make . . . payments, for the subjects discussed were otherwise within the approved category of publications.[35]

Finally, in *Widmar v. Vincent*,[36] the Court held that a public university policy that encouraged use of its facilities by student organizations but prohibited any use "for purposes of religious worship or religious teaching" violated

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religious activities could not properly be characterized as falling outside the scope of the program. Similarly, this construction does not rely upon the distinction among types of religious speech rejected by the Court in *Widmar* and *Fowler*. *See supra* notes 10-14 and accompanying text. The narrow construction does not attempt to distinguish among types of religious activity based on religious criteria but rather based on the extent to which the activity furthers defined government objectives.

29 508 U.S. 384 (1993).

30 *Id.* at 387.

31 *Id.* at 393; *see also id.* at 393-97.

32 515 U.S. 819 (1995).

33 *Id.* at 845-46.

34 *Id.* at 825.

35 *Id.* at 831.

36 454 U.S. 263 (1981).

the Free Speech Clause.[37] The Court held that "religious worship and discussion" are "forms of speech and association protected by the First Amendment."[38]

Taken together, these cases clearly indicate that when the government suppresses private religious expression that is otherwise within the scope of a government program (e.g., by denying government resources for such expression), it engages in viewpoint discrimination. And this is precisely what happens when a broad construction of the religious expression restrictions is applied to a government funded program. For instance, religious instruction or worship directed toward overcoming drug addiction might be considered by some as "quintessentially religious" or "decidedly religious in nature," but it can "also be characterized properly as the teaching of [addiction recovery] from a particular viewpoint."[39] Denying funding to such expression, as required under a broad construction, constitutes viewpoint discrimination.

This discrimination is evident in a settlement agreement[40] entered into by the parties in *ACLU v. Foster*.[41] The agreement establishes parameters under which the State of Louisiana will in the future administer funds for abstinence programs operated by faith-based organizations. It is important to note that these government funds are provided pursuant to a federal program created to "teach[] the social, psychological and health gains to be realized by abstaining from sexual activity."[42] Such teaching is to include, among other things, the message that "a mutually faithful monogamous relationship in context of marriage is the expected standard of human sexual activity."[43] Pursuant to the settlement agreement, participating faith-based organizations will be required by the state to certify each month that "no activity, event, or material created or supported in whole or in part with [government] funds has included *religious content*; [and] that no [government] funds have been used to advocate or promote, through prayer or otherwise, *religion or religious messages*."

These conditions create fundamentally the same kind of viewpoint discrimination that the Court struck down in *Good News Club*.[44] By excluding *religious messages* and *religious content*, the settlement agreement establishes a program under which funded participants may invoke any theoretical foundation for the social and psychological benefits of abstinence, or for the promotion of

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37 *Id.* at 265-66.

38 *Id.* at 269.

39 *Good News Club*, 533 U.S. at 111.

40 This settlement agreement is on file with the author.

41 No. 02-1440, 2002 WL 1733651 (E.D. La. July 24, 2002).

42 42 U.S.C. § 710(b)(2)(A) (2000).

43 *Id.* § 710(b)(2)(D).

44 *See supra* notes 19-28 and accompanying text.

a mutually faithful monogamous relationship in the context of marriage, except a religious one. For instance, the program will fund the message that abstinence protects you from emotional vulnerability to others and thereby improves your self-image, making you a more well-adjusted member of society and ultimately more happy and fulfilled. But it will not fund the message that abstinence promotes emotional dependence on God, resulting in deeper, more meaningful relationships and an abiding sense of joy. This is viewpoint discrimination at its core: two perspectives on the social and psychological benefits of abstinence, one funded and the other excluded.

B. *A Broad Construction of the Restricted Religious Expression Violates Free Speech Rights Under* Velazquez

Depending upon their nature, some government funding programs (such as the one at at issue in *Rosenberger*) may implicate free speech rights under speech forum doctrine. The Court has held that when the government creates a speech forum of any kind, it must maintain a position of neutrality with respect to viewpoints on topics within the scope of the forum;[45] the government "must not discriminate against [religious] speech on the basis of viewpoint."[46] But free speech rights are also implicated in government subsidy programs that do not create a speech forum.[47] Indeed, the existence of viewpoint discrimination in such programs strongly indicates that they violate the Free Speech Clause.

In *Legal Services Corporation v. Velazquez*,[48] the Court struck down a provision in the Legal Services Corporation ("LSC") Act that prohibited participating lawyers from representing clients in cases involving "an effort to amend or otherwise challenge existing welfare law."[49] A five Justice majority held that the government may not impose substantial and harmful restrictions on the speech of grantee organizations in connection with government aid programs "designed to facilitate private speech, not to promote a governmental message."[50] The Court noted that "when the government disburses public funds to private entities to convey a governmental message, it may take legitimate and appropriate steps to ensure that its message is neither garbled nor distorted by the grantee."[51] However, "it does not follow . . . that viewpoint-based restric-

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45 Board of Regents of Univ. of Wis. System v. Southworth, 529 U.S. 217 (2000).

46 *Good News Club*, 533 U.S. at 106-07 (citations omitted).

47 *See generally* Randall P. Bezanson & William G. Buss, *The Many Faces of Government Speech*, 86 IOWA L. REV. 1377 (2001); Robert C. Post, *Subsidized Speech*, 106 YALE L.J. 151 (1996).

48 531 U.S. 533 (2001).

49 *Id.* at 537.

50 *Id.* at 542.

51 *Id.* at 541 (quoting *Rosenberger*, 515 U.S. at 833).

tions are proper when the government does not itself speak or subsidize transmittal of a message it favors but instead expends funds to encourage a diversity of views from private speakers."[52]

The Court cited two factors in support of its conclusion that the LSC Act was designed to facilitate private speech. First, the Court concluded that the government did not intend to convey a particular message under the LSC Act, but rather to fund attorneys to speak on behalf of welfare claimants. The Court observed that in suits for welfare benefits, the LSC lawyer "is not the government's speaker. The attorney defending the decision to deny benefits will deliver the government's message."[53] Second, the Court observed that the LSC Act seeks to use an "existing medium of expression," namely the state and federal court system, to accomplish its objective of assisting welfare claimants.[54] In short, "the program presumes that private, nongovernmental speech is necessary, and a substantial restriction is placed upon that speech."[55]

Having established that the LSC Act "funds constitutionally protected expression," the Court identified a number of harms arising from the restriction on speech.[56] For instance, the Court noted that the restrictions on representation "distort[] the legal system by altering the traditional role of attorneys . . . ."[57] Specifically, the "restriction imposed by the statute . . . threatens *severe impairment* of the judicial function" because it attempts "to *draw lines around* the LSC program *to exclude* from litigation *those arguments and theories* Congress finds unacceptable but *which by their nature are within the province of the courts* to consider."[58]

The Court also noted that the restrictions impose a significant impact on welfare claimants since, "in cases where the attorney withdraws from a representation, the client is unlikely to find other counsel."[59] As a result, "with respect to litigation services Congress has funded, there is no alternative channel for expression of the advocacy Congress seeks to restrict."[60]

The rationale of the majority in *Velazquez* applies with equal force to the restrictions on "sectarian worship, instruction or proselytization" in government-funded programs subject to charitable choice. First, the government does not intend to convey any particular "programmatic message," in many (if not

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52 *Id.* at 542 (quoting *Rosenberger*, 515 U.S. at 834).

53 *Id.*

54 *Id.* at 543-44.

55 *Id.*

56 *Velazquez*, 531 U.S. at 548.

57 *Id.* at 544.

58 *Id.* at 546 (emphasis added).

59 *Id.*

60 *Id.*

all) such programs.[61] With respect to the SAMHSA program, funds are provided for programs that either (1) provide "comprehensive community mental health services to adults with serious mental illness and to children with a serious emotional disturbance" or (2) plan, carry out or evaluate "activities to prevent and treat substance abuse."[62] Nothing in the SAMHSA sections suggest that the government intends to convey any particular message, or prefer any particular viewpoint, with respect to the treatment of mental illness or substance abuse.[63]

Second, the government-funded programs use "existing mediums of expression," faith-based and community social service organizations, to accomplish their objectives. Faith-based organizations are, practically by definition, expressive associations. The expression of religious commitment, in words or merely by action, is central to their interaction with the surrounding community and their self-identity.[64] Further, in many of its programs, the government presumes that the private, nongovernmental speech of the service providers is necessary to accomplishing the program objectives, whether training for welfare-to-work or counseling on overcoming addiction.

Finally, the religious expression restrictions, broadly interpreted, impose substantial harm on the speech of faith-based organizations and on the social service system. Religious viewpoints and approaches have traditionally constituted a fundamental component of the social service system and are by their nature within the province of the faith-based organizations that provide social services.[65] Broad restrictions effectively "draw lines around" the funded social services to exclude the uniquely religious viewpoints and approaches to the delivery of such services offered by faith-based organizations. In essence, such restrictions require many faith-based organizations to surrender their core identity, and their distinct contribution to the delivery of social services, in order to participate in the program. As a result, broad religious expression restrictions distort the social service system by altering the traditional role of private faith-based organizations in the same manner that the LSC Act restrictions "distort[] the legal system by altering the traditional role of attorneys."[66] Further, such restrictions "severely impair" participating faith-based organizations and the social service system as a whole.

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61 *Id.* at 548.

62 42 U.S.C. §§ 300x-1(a), 21(b).

63 *See* 42 U.S.C. §§ 300x-5, 31 (setting forth conditions on the use of funds).

64 *Cf.* Boy Scouts of America v. Dale, 530 U.S. 640 (2000) (holding that the Boy Scouts is an expressive association).

65 *See* THE WHITE HOUSE, UNLEVEL PLAYING FIELD: BARRIERS TO PARTICIPATION BY FAITH-BASED AND COMMUNITY ORGANIZATIONS IN FEDERAL SOCIAL SERVICE PROGRAMS (2001) (discussing the role of faith-based organizations in the social service system), *available at* http://www.whitehouse.gov/news/releases/2001/08/unlevelfield.html.

66 *Velazquez*, 531 U.S. at 544.

In addition, a broad construction of the restrictions may impose a significant impact on social service recipients since, in situations where faith-based organizations are not eligible to express their viewpoints on social services supported by government-funded programs, the recipients may be unable to find other sources for such viewpoints or for such services provided from a religious perspective. Just as with the representation funded by the LSC Act, the services funded by government programs may not be generally available from privately funded sources.[67] Indeed, once the government enters a particular social service segment, it may become difficult to raise private funds to provide services in that segment. As a result, with respect to social services Congress has funded, there may be in many cases no alternative channel available to recipients for expression of the viewpoints restricted under a broad construction.

In support of its analysis, the *Velazquez* majority referred to several cases in which government speech restrictions were struck down under a forum analysis. The Court concluded that "just as the government in those cases could not elect to use a broadcasting network or a college publication structure in a regime which prohibits speech necessary to the proper functioning of those systems, so it may not design a subsidy to effect this serious and fundamental restriction on advocacy of attorneys and the functioning of the judiciary."[68] Similarly, the government may not elect to use faith-based organizations in a program that prohibits the religious viewpoints and approaches that are a defining characteristic of many such organizations and an integral part of the social service system.

C. *A Broad Construction of the Restricted Religious Expression Also Violates Free Speech Rights Under* Finley *and* Simon & Schuster

The *Velazquez* dissent asserted that free speech rights are implicated in government subsidy programs only if (1) the funding program creates a forum for speech or (2) the speech restrictions in the program are "aimed at the suppression of dangerous ideas," or "threaten[] to drive certain ideas or viewpoints from the marketplace."[69] The dissent cited *National Endowment for Arts v. Finley*,[70] a case in which the Court rejected a free speech challenge to a statutory provision governing the National Endowment for the Arts ("NEA") that required the NEA to "tak[e] into consideration general standards of decency and respect for the diverse beliefs and values of the American public."[71] Noting that "the First Amendment certainly has application in the subsidy context," the

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67 *Id.* at 546.

68 *Id.* at 544.

69 *Id.* at 552 (Scalia, J., dissenting) (citing Speiser v. Randall, 357 U.S. 513, 519 (1958) and Nat'l Endowment for Arts v. Finley, 524 U.S. 569, 587 (1998)).

70 524 U.S. 569 (1998).

71 *Id.* at 572.

Court in *Finley* distinguished the challenged restrictions from those creating a "disproportionate burden calculated to drive 'certain ideas or viewpoints from the marketplace.'"[72]

In *Simon & Schuster, Inc. v. Members of New York State Crime Victims Board*,[73] the Court struck down a law which required income from published works of an accused or convicted criminal describing his crime to be deposited in an escrow account for the benefit of the criminal's victims and creditors. The Court noted that the law at issue "plainly imposes a financial disincentive only on speech of a particular content."[74] The Court stated that "the government's ability to impose content-based burdens on speech raises the specter that the government may effectively drive certain ideas or viewpoints from the marketplace."[75]

The Court in *Rosenberger* held that just such a result follows from a restriction on all religious expression. In rejecting the dissent's "assertion that no viewpoint discrimination occurs" when a restriction applies to an entire class of viewpoints, the Court stated:

> [o]ur understanding of the complex and multifaceted nature of public discourse has not embraced such a contrived description of *the marketplace of ideas.* If the topic of debate is, for example, racism, then exclusion of several views on that problem is just as offensive to the First Amendment as exclusion of only one. It is as objectionable to exclude both a theistic and an atheistic perspective on the debate as it is to exclude one, the other, or yet another political, economic, or social viewpoint.[76]

Rosenberger recognized the impact that the government can have on the marketplace of ideas. In this regard,

> [i]t should be remembered that when the First Amendment was proposed and ratified, the government had little or no involvement in education, social welfare, or the formation and transmission of culture. These functions were predominantly left to the private sphere, and within the private sphere religious institutions played a leading role. As the government has assumed wider and wider responsibility for the funding and regulation of

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72 *Id.* at 587 (quoting Simon & Schuster, Inc. v. Members of N.Y. State Crime Victims Bd., 502 U.S. 105, 116 (1991)).

73 502 U.S. 105 (1991).

74 *Id.* at 116.

75 *Id.*

76 Rosenberger v. Rector and Visitors of the Univ. of Virginia, 515 U.S. 819, 831 (1995) (emphasis added).

> these functions, the idea of a "secular state" has become more and more ominous. When the state is the dominant influence in the culture, the "secular state" becomes the equivalent of a secular culture. Religious influences are confined to those segments of society in which the government is not involved, which is to say that religion is confined to the margins of national life—to those areas not important enough to have received the helping or controlling hand of government.[77]

By eliminating all religious viewpoints on subject matters within the scope of a government program, a broad construction of the religious expression restrictions would "threaten to drive certain ideas or viewpoints from the marketplace."[78] In the context of a government subsidy, the marketplace of ideas is defined by the objectives of the program (e.g., addiction recovery or job skills). If the government funds only nonreligious viewpoints on or approaches to such objectives, it puts religious viewpoints and ideas at a significant disadvantage in the marketplace. It is no response in this context to say that faith-based organizations can present such viewpoints and ideas without government funds. While that is clearly correct, it does not account for the impact on the marketplace of the government funding. As discussed above, this impact may be of such magnitude that it would effectively overwhelm the presence of religious viewpoints and approaches in the marketplace as defined by the objectives of the government program.[79]

D. *A Broad Construction of the Restricted Religious Expression Is Not Supported by* Rust

The *Velazquez* dissent also argued that the restrictions in the LSC Act were indistinguishable from restrictions in a funding program upheld in *Rust v. Sullivan*.[80] The program at issue in *Rust* "authorized grants for the provision of family planning services, but provided that 'none of the funds . . . shall be used in programs where abortion is a method of family planning.'"[81] The implementing regulations further provided that organizations receiving government funds under the program could not refer clients to an abortion provider for prenatal services.[82] In upholding these restrictions against a free speech challenge, the

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77 Michael W. McConnell, *Why Is Religious Liberty The "First Freedom"?*, 21 CARDOZO L. REV. 1243, 1261 (2000).

78 Legal Services Corp. v. Velazquez, 531 U.S. 533, 552 (2001) (Scalia, J., dissenting).

79 *See supra* note 67 and accompanying text.

80 500 U.S. 173 (1991).

81 *Velazquez*, 531 U.S. at 553 (Scalia, J., dissenting) (quoting *Rust*, 500 U.S. at 178).

82 *Id.*

Court in *Rust* made the general observation that "[t]he Government can, without violating the Constitution, selectively fund a program to encourage certain activities it believes to be in the public interest, without at the same time funding an alternative program which seeks to deal with the problem in another way."[83] More specifically, the Court noted that the abortion restrictions are consistent with the focus of the program on family planning as opposed to prenatal care.[84] In this regard, the program restrictions did not present "a case of Government 'suppressing a dangerous idea,' but of a prohibition on a project grantee or its employees from engaging in activities outside of the project's scope."[85]

Clearly, *Rust* indicates that not all expressive restrictions associated with government aid implicate free speech rights. The *Velazquez* majority observed that viewpoint-based funding decisions can be sustained in "instances, like *Rust*, in which the government 'used private speakers to transmit specific information pertaining to its own program.'"[86] In *Rosenberger*, the Court explained that *Rust* stood for the proposition that "when the government appropriates public funds to promote a particular policy of its own it is entitled to say what it wishes."[87] However, "[n]either the latitude for government speech nor its rationale applies to subsidies for private speech in every instance."[88]

The actual language in the *Rust* and *Velazquez* opinions does not clearly delineate the limits of the respective cases. One key question is whether the government, in funding private speech through a particular program, is intending to "transmit *specific* information" or "promote a *particular* policy of its own."[89] In answering this question, the Court has noted that "Congress cannot recast a condition on funding as a mere definition of its program in every case, lest the First Amendment be reduced to a simple semantic exercise."[90] This is particularly the case where there is no basis for asserting that the conditions are meaningfully related to the objectives of the program. In this regard, a broad construction appears less like an attempt to ensure that the recipient conveys a particular governmental message or policy than it does an effort to suppress all religious viewpoints on any such message or policy (assuming there is one). Because it restricts expressive activities that are otherwise clearly directed toward government program objectives, a broad construction cannot readily be

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83 *Rust*, 500 U.S. at 193.

84 *Id.*

85 *Id.* at 194.

86 Legal Services Corp. v. Velazquez, 531 U.S. 533, 541 (2001) (quoting Rosenberger v. Rector and Visitors of the University of Virginia, 515 U.S. 819, 833 (1995)).

87 *Rosenberger*, 515 U.S. at 833 (citing *Rust*, 500 U.S. at 194).

88 *Velazquez*, 531 U.S. at 542.

89 *Rosenberger*, 515 U.S. at 833 (emphasis added).

90 *Velazquez*, 531 U.S. at 547.

characterized as a condition that defines the scope of the program (i.e., a condition that brings a program under *Rust*).[91]

Similarly, even in those government programs where there is a particular policy or message that the government is promoting (e.g., abstinence), *Rust* does not support the exclusion of all religious viewpoints on the message.[92] Although *Rust* permits restrictions on expression outside the scope of the program, it says nothing about restrictions on expression otherwise within the scope of the program.[93] By way of contrast, a narrow construction of the restrictions fits nicely within the parameters of *Rust*, excluding only content outside the scope of the program and ensuring that only expression in furtherance of the particular program objectives is funded. In short, a broad construction of the religious activity restrictions aligns more closely with the rationale underlying *Velazquez* than with that underlying *Rust*.

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[91] One difficulty in reconciling *Rust* and *Velazquez* arises from the differing levels of generality the Court used in articulating the applicable government policy. In *Rust* the Court construed the policy narrowly (distinguishing family planning from prenatal services), but in *Velazquez* the Court defined it broadly (providing access to the legal system). The selected degree of abstraction in each case, although perhaps not determinative of the outcome, certainly pointed strongly to it. But regardless of the selected level of abstraction, the government cannot have as an objective hostility to private viewpoints because they are religiously-informed. *See, e.g.*, Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 532 (1993) ("In our Establishment Clause cases we have often stated the principle that the First Amendment forbids an official purpose to disapprove of a particular religion or religion in general."); Am. Family Ass'n v. City and County of San Francisco, 277 F.3d 1114 (9th Cir. 2002). The special status of private religious viewpoints under the Religion Clauses distinguishes religious expression restrictions from the abortion restrictions in *Rust*. The government is not constitutionally prohibited from expressing disfavor for abortion (even though it must protect a women's right to choose an abortion). The expression of such disfavor is a constitutionally legitimate governmental objective whereas the expression of disfavor for private religious viewpoints is not. In contrast to the restrictions upheld in *Rust*, a government program that permits all private viewpoints on a particular subject matter except those from a religious perspective might reasonably be characterized as expressing disfavor for private religious viewpoints. *See, e.g.*, Good News Club v. Milford Cent. Sch., 533 U.S. 98, 118 (2001) (noting "the danger that [schoolchildren] would perceive a hostility toward the religious viewpoint if [a Bible club] were excluded from [a] public forum.").

[92] *See* Post, *supra* note 47, at 168 (arguing that restrictions on subsidized speech must at least be "instrumentally necessary" to the attainment of legitimate governmental purposes). There is no rational relationship between advancing the government's message (defined without respect to religion) and suppressing all private religious viewpoints that advance the message.

[93] With respect to the program at issue in *Foster*, it cannot reasonably be said that religious perspectives on the social and psychological benefits of abstinence, and on the "expected standard of human sexuality," are outside the scope of the program. There is no statutory basis for such an assertion and, indeed, the settlement agreement does not even make this assertion. *See supra* notes 40-44 and accompanying text.

E. *A Broad Construction of the Restricted Religious Expression Is More Likely to Implicate Free Exercise Rights*

Because broad restrictions on religious expression are not neutral with respect to religion (i.e., they constitute religious viewpoint discrimination), they violate not only the Free Speech Clause, but also the Free Exercise Clause. With respect to the Free Exercise Clause, the Supreme Court has held that "a law that is neutral and of general applicability need not be justified by a compelling governmental interest even if the law has the incidental effect of burdening a particular religious practice."[94] However, "[a] law failing to satisfy these requirements must be justified by a compelling governmental interest and must be narrowly tailored to advance that interest."[95]

As an initial matter, the religious expression restrictions, broadly construed, are not neutral with respect to religion because they use religious criteria to determine whether or not a particular expressive activity may be funded. The Court in *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*[96] stated that "the minimum requirement of neutrality is that a law not discriminate on its face."[97] The Court noted that "[a] law lacks facial neutrality if it refers to a religious practice without a secular meaning discernible from the language or context."[98] As discussed above, a broad construction of the religious expression restrictions refers and applies specifically to religious viewpoints on and approaches to the delivery of social services. Because religion is their defining characteristic, such viewpoints and approaches clearly have no secular meaning. Therefore, a broad construction of the restrictions does not even satisfy the minimum requirement of facial neutrality.[99]

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94 Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 531 (1993) (citing Employment Div., Dep't of Human Res. of Ore. v. Smith, 494 U.S. 872 (1990)).

95 *Id.* at 531-32. Broad restrictions may also create unconstitutional conditions since they require religious organizations to forego their free speech and free exercise rights as a condition of participating in a government-funded program and this requirement is not justified by the objectives of the program. For instance, in *McDaniel v. Paty*, 435 U.S. 618 (1978), the Supreme Court unanimously struck down a Tennessee law prohibiting ministers from holding elective office in the state legislature. The plurality opinion held that the law was subject to strict scrutiny because it imposed an unconstitutional condition on the free exercise of ministers. *Id.* at 626 (plurality) (citing Sherbert v. Verner, 374 U.S. 398, 406 (1963)); *see id.* at 633 (Brennan, J., concurring). As applied in federal law, a broad construction of the restrictions may also be subject to strict scrutiny under the Religious Freedom Restoration Act, 42 U.S.C. §§ 2000bb *et seq.* (1993).

96 508 U.S. 520 (1993).

97 *Id.* at 533.

98 *Id.*

99 Construed narrowly, the restrictions can be understood as merely one category, among many, of nonqualifying activity. In this context, the requirements of facial neutrality are more readily satisfied.

The Ninth Circuit recently applied this analysis to a scholarship program in the State of Washington.[100] The scholarship program was open to all students with qualifying academic and family income status who chose to attend an accredited post-secondary institution in Washington. However, students meeting these criteria were not eligible for scholarships if they chose to pursue a degree in theology.[101] The court concluded that this exclusion violated the Free Exercise Clause because it was not neutral with respect to religion.[102] The court distinguished the scholarship program from the funding program at issue in *Rust* on the basis that the scholarship program was not set up to present the government's message but rather "to fund the educational pursuits of students."[103] In such a program, the court ruled that the government must maintain viewpoint neutrality, particularly with respect to religion. The court concluded that "[a] state law may not offer a benefit to all . . ., but exclude some on the basis of religion."[104] Because the scholarship program was "administered so as to disqualify only students who pursue a degree in theology from receiving its benefits," it failed the requirement of facial neutrality.[105]

The lack of neutrality is also evident in the fact that the religious expression restrictions, broadly construed, are unrelated to the interests furthered by the government program. In other words, such restrictions serve not to protect or promote the interests of the government program, but rather merely to distinguish between favored and unfavored expression. In *Lukumi*, the Court evaluated several city ordinances that banned the ritual sacrifice of animals; these laws directly burdened the religious practice of local members of the Santeria religion, who challenged the laws in court.[106] The Court held that the ordinances were not neutral in part because they were drafted to suppress religious conduct without reference to the legitimate ends asserted in their defense.[107] The Court acknowledged that the ordinances address concerns "unrelated to religious animosity" such as public health and prevention of cruelty to ani-

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100 *See* Davey v. Locke, 299 F.3d 748 (9th Cir. 2002).

101 *See id.* at 750.

102 *See id.*

103 *Id.* at 752.

104 *Id.* at 754 (comparing the scholarship program to the law struck down in *McDaniel*).

105 *Id.* Having established that the scholarship program implicates free exercise concerns by discriminating against religion, the court examined the State's justifications for the restriction under strict scrutiny. The court concluded that the State's interest in complying with its own constitutional prohibition against funding religious education was not compelling. *Id.* at 760. The court noted that funds would reach religious institutions only as a result of the "private choice" of recipients to pursue a religious education. *Id.* (citing Zelman v. Simmons-Harris, 122 S.Ct. 2460 (2002) (upholding school voucher program that included religious schools)).

106 Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 525-28 (1993).

107 *See id.* at 535-40.

mals.[108] However, in reading the ordinances together, the Court concluded that they "disclose an object remote from these legitimate concerns."[109] Specifically, "although Santeria sacrifice is prohibited, killings that are no more necessary or humane in almost all other circumstances are unpunished."[110] The same "remote object" may appear with respect to broad religious expression restrictions that are unrelated to ensuring that government funds only go to activities that further the government's objectives.[111] In short, "a law which visits 'gratuitous restrictions on religious conduct' . . . seeks not to effectuate the stated governmental interests, but to suppress the conduct because of its religious motivation."[112]

A law also lacks neutrality if it improperly favors certain types of religious organizations over others. In *Larson v. Valente*,[113] the Court stated that "the fullest realization of true religious liberty requires that government . . . effect no favoritism among sects . . . and that it work deterrence of no religious belief."[114] The state law at issue in *Larson* required charitable and religious organizations soliciting contributions to register with the state and submit periodic reports on its solicitation activities. The law contained an exemption, however, for religious organizations that received more than half of their total contributions from members or affiliated organizations.[115] The law was challenged by a religious organization that did not qualify for the exemption.

In striking down the exemption, the Court held that even though the distinction between covered and exempt religious organizations was formally neutral in that it did not turn on religious criteria, the exemption was not actually

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108 *Id.* at 535.

109 *Id.*

110 *Id.* at 536.

111 In *Davey*, the Ninth Circuit noted that the exclusion of students pursuing a degree in theology from the scholarship program "has nothing to do with the purpose or point of the program. To the extent that the message behind the [scholarship program] is that doing well in high school pays off, and that going to college in Washington is a good thing, and that developing the talents of promising students is of great importance to the state, it is qualified with the message 'unless the student pursues a degree in theology from a religious perspective.'" 299 F.3d at 756.

112 *Lukumi*, 508 U.S. at 538; *see also* Hartmann v. Stone, 68 F.3d 973 (6th Cir. 1995) (striking down under the Free Exercise Clause day care licensing regulations at military bases that prohibited any religious activities).

113 456 U.S. 228 (1982)

114 *Id.* at 246 (quotation omitted). Even though *Larson* was decided under the Establishment Clause, the Court applied the same strict scrutiny test once it determined that the law at issue did not treat all religious denominations equally. *Id.* at 247. Further, the Court in *Larson* expressly noted that the "constitutional prohibition of denominational preferences is inextricably connected with the continuing vitality of the Free Exercise Clause." *Id.* at 245.

115 *Id.* at 231-32.

neutral with respect to religion.[116] Rather, the Court determined that the criteria "effectively distinguishe[d] between well-established churches that have achieved strong but not total financial support from their members . . . and churches which are new and lacking in a constituency, or which, as a matter of policy, may favor public solicitation over general reliance on financial support from members . . . ."[117] As a result, the statute was "not simply a facially neutral statute, the provisions of which happen to have a 'disparate impact' upon different religious organizations," but rather the statute made "explicit and deliberate distinctions between different religious organizations."[118]

In *University of Great Falls v. NLRB*,[119] the District of Columbia Circuit Court struck down the "substantial religious character" test used by the NLRB to determine whether it may exercise jurisdiction over a religious employer. This test involved, among other things, an examination of the religious beliefs of the student body and faculty and a determination of the extent to which other views are tolerated on campus.[120] In support of its conclusion, the court noted that, by failing to exempt institutions with a more objectively secular approach to education, the test "may minimize the legitimacy of the beliefs expressed by the religious entity."[121] The court correctly observed that if an entity "is ecumenical and open-minded, that does not make it any less religious."[122] Therefore, "[t]o limit the . . . exemption to religious institutions with hard-nosed proselytizing [and] that [serve only] members of their religion . . . is an unnecessarily stunted view of the law, and perhaps even itself a violation of the most basic command of the Establishment Clause – not to prefer some religions (and thereby some approaches to indoctrinating religion) to others."[123]

The *Great Falls* court concluded that failing to exempt religious institutions that take a "secular" approach to the delivery of educational services creates an unconstitutional preference. The same result applies to the exclusion from government-funded programs of religious organizations that take a religious approach to the delivery of social services. In other words, the disparate treatment of religious expression under a broad construction of the restrictions is of the same fundamental character as the treatment struck down in *Great Falls* and in *Larson*. Broadly construed restrictions make "explicit and deliberate distinctions" that "effectively distinguish" between religious institutions with

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116 *Id.* at 246.

117 *Id.* at 247 n.23 (citation and quotation omitted).

118 *Id.*

119 278 F.3d 1335 (D.C. Cir. 2002).

120 *Id.*

121 *Id.* at 1345.

122 *Id.* at 1346.

123 *Id.* (citing *Larson*, 456 U.S. at 244).

different approaches to the provision of social services. Those institutions that deliver such services from an overtly religious perspective are excluded, while those institutions whose approach is more objectively secular (but in some sense covertly religious) are included.

Finally, a broad construction of the restrictions creates an impermissible governmental incentive for religious institutions to adjust their theology and form of ministry.[124] For instance, religious institutions have an incentive to "tone down" the extent to which they express their religious views in the delivery of social services. These incentives work deterrence on religious doctrine that emphasizes an overt approach to expression.

In applying the neutrality requirement of the Free Exercise Clause, the Court has stated that it must "survey meticulously the circumstances of governmental categories to eliminate, as it were, religious gerrymanders."[125] With respect to a broad construction of the religious expression restrictions, the survey is not difficult. By its express terms, its relationship to the government program objectives, its disparate impact and its incentives, a broad construction fails to comply with the neutrality principles articulated by *Lukumi* and *Larson*.

F. The Errors of the District Court in McCallum

In *Freedom From Religion Foundation, Inc. v. McCallum*,[126] a federal district court expressly considered, and rejected, several free speech and free exercise arguments related to broad restrictions on religious expression in a government aid program. The case involved a challenge by taxpayers to certain grants made by the state of Wisconsin to a faith-based organization that engaged in integrated religious activities. With respect to the free speech issues, the court concluded that "[t]he state of Wisconsin's decision to contract with private entities to deliver a portion of its social services does not create, encourage or otherwise facilitate private speech."[127] This conclusion rested on the proposition in *Rust* that the government has a message it wishes to convey through the funded program. But the court merely assumed the existence of such a message without even identifying it or considering the alternative proposition. In this regard, the court apparently believed it was sufficient to conclude that the government did not intend to create a forum for speech through the program.[128] However, *Velazquez* and *Finley* make clear that private speech issues arise in government aid programs even where the programs do not create a forum for

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124 *See* Corp. of Presiding Bishop v. Amos, 483 U.S. 327, 343-44 (1980) (Brennan, J., concurring) (discussing the incentives that would result from a rule distinguishing between the secular and religious activities of a religious organization).

125 *Lukumi*, 508 U.S. at 534 (internal quotation marks and citation omitted).

126 179 F. Supp. 2d 950 (W.D. Wis. 2002).

127 *Id.* at 980.

128 *Id.*

speech. Indeed, the court did not even consider the extent to which the *Velazquez* factors might apply to restrictions on speech in this program.

Further, the court overstated the authority of the government to restrict speech under *Rust* by holding that the restrictions may apply even to viewpoints on subjects within the scope of the government program.[129] As discussed above, the Supreme Court made it quite clear that the restrictions on speech in *Rust* were permissible in part because they only excluded speech outside the scope of the program.[130] *Rust* provides no support for the proposition that the government may restrict viewpoints on speech otherwise within the scope of the program. Finally, the court indicated that the restrictions on religious speech required by its decision only amount to "content-based" exclusions,[131] a characterization clearly inconsistent with the analysis of religious expression restrictions in *Good News Club*.[132]

In short, the *McCallum* court's analysis of the free speech issues failed to consider the significance of several important cases, and it misread the case upon which it primarily relied. Similarly, the court's free exercise analysis failed to consider the rights of faith-based organizations, focusing instead only on service beneficiaries. Further, the court did not consider the lack of neutrality arising from the imposition of broad religious expression restrictions, nor did it apply a strict scrutiny analysis to such restrictions. In light of these deficiencies, the court's analysis provides no basis for concluding that the government may impose broad religious expression restrictions on faith-based organizations without infringing upon free speech or free exercise rights.

IV. A NARROW CONSTRUCTION OF THE RELIGIOUS EXPRESSION RESTRICTIONS SATISFIES ESTABLISHMENT CLAUSE REQUIREMENTS

In its most recent cases, the Court has used three primary criteria to "guide the determination of whether a government-aid program impermissibly advances religion: (1) whether the aid results in governmental indoctrination, (2) whether the aid program defines its recipients by reference to religion, and (3) whether the aid creates an excessive entanglement between government and religion."[133] The second and third criteria rarely apply, leaving the analysis of governmental indoctrination as the primary factor. To avoid governmental indoctrination of religion, the Court has held that direct government subsidy pro-

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129 *Id.*

130 *See supra* notes 83-85 and accompanying text.

131 *McCallum*, 179 F. Supp. 2d at 980.

132 *See supra* notes 19-28 and accompanying text.

133 Mitchell v. Helms, 530 U.S. 793, 845 (2000) (O'Connor, J., concurring) (citing Agostini v. Felton, 521 U.S. 203, 234 (1997)).

grams must be structured so as to ensure that the aid is not diverted to certain types of religious activities.[134]

This holding creates a potential dilemma related to the permissible scope of restrictions that preclude individuals from engaging in protected religious expressive activity in connection with their performance of activities funded in whole or in part with government funds. Specifically, to the extent that the Establishment Clause prohibits direct funding of expression that, but for its religious content, falls within the scope of the funded program, the Establishment Clause constraints conflict with the free speech and free exercise rights of the religious organizations.

This dilemma may be resolved in two ways. First, the Establishment Clause can be read as prohibiting only those types of religious activities that do not implicate free speech or free exercise rights in a particular program. Second, where the Establishment Clause prohibits activity otherwise protected by the Free Speech (or Free Exercise) Clause, either one or the other of the clauses must be held to trump. As discussed below, the Court has left open the first alternative by never expressly holding that the Establishment Clause requires a broad construction of the religious expression restrictions. With respect to the second alternative, the Court has not expressly committed to a position.

A. *The United States Supreme Court Has Not Held That the Establishment Clause Requires a Broad Construction of Religious Expression Restrictions*

Although the Court's rulings suggest that restrictions must generally be in place to ensure that government funds are not used for "religious indoctrination" activities,[135] the Court has never been required to identify any such activities in the context of a government aid program, or to describe precisely the religious character and context of such activities. Specifically, the Court has not discussed the meaning of any particular terms used to describe the private religious expression that must not be funded by the government under a religiously neutral aid program. Even more specifically, there is no Supreme Court guidance available in government aid cases as to what types of activities constitute "sectarian worship, instruction, or proselytization" for purposes of attributing religious indoctrination to the government.

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[134] *See id.* at 840-42 (O'Connor, J., concurring) (holding, in contrast with the plurality, that actual diversion of government aid to religious indoctrination is not consistent with the Establishment Clause); Bowen v. Kendrick, 487 U.S. 589, 621 (1988) (holding that a government aid program may violate the Establishment Clause if the funds are expended on "specifically religious activities").

[135] *See, e.g.*, Roemer v. Bd. of Pub. Works of Maryland, 426 U.S. 736, 759 (1976) (plurality); Mitchell v. Helms, 530 U.S. 793, 867 (2000) (O'Connor, J., concurring). *But see infra* note 143-46 and accompanying text.

Instead of identifying any particular religious activities that constitute impermissible religious indoctrination, the Court has merely held in each case that the structure of the aid and the conditions prohibiting use of funds for certain generically defined religious activities provided *sufficient* separation between the expression and the government. In *Mitchell v. Helms*,[136] the Court considered a school aid program that prohibited the use of the aid for "religious worship or instruction."[137] Without parsing the meaning of these words, Justice O'Connor in her concurring opinion simply concluded that the restriction (together with other factors) was sufficient to avoid Establishment Clause violations. She stated that "[r]egardless of whether these factors are constitutional requirements, they are surely sufficient to find that the program at issue here does not have the impermissible effect of advancing religion."[138] Even the evidence cited by Justice O'Connor of *de minimis* violations does not yield any useful insight into the meaning of the terms "religious worship or instruction." Justice O'Connor noted that there was evidence suggesting that a second grade teacher may have used the government materials "in all subjects," and that one religious school may have used some materials in its theology classes.[139] However, because the scope of the activity constituting the presumed diversion was *de minimis*, there was no need to consider whether use of the materials in particular classes having religious content actually constituted use for religious worship or instruction.[140]

In *Agostini v. Felton*,[141] the Court based its finding that there was no impermissible governmental indoctrination of religion in part on the lack of evidence that any government-funded teachers had "attempted to inculcate religion in students."[142] As a result, the Court gave no consideration as to exactly what type of teaching would constitute an inculcation of religion.

In *Bowen v. Kendrick*,[143] the Court rejected a facial Establishment Clause challenge to the Adolescent Family Life Act, which provided for grants to private nonprofit organizations (including religious organizations) for counseling and educational services related to adolescent sexual relations and preg-

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136 530 U.S. 793 (2000).

137 *Id.* at 849 (O'Connor, J., concurring).

138 *Id.* at 867 (O'Connor, J., concurring).

139 *Id.* at 864.

140 A similar result applies with respect to 191 religious library books borrowed by the schools under the government program. Because the school conceded that the books were not "secular, neutral and nonideological" as required under the program, there is no discussion in the case as to why the particular religious content in the books violated these terms.

141 521 U.S. 203 (1997).

142 *Id.* at 228.

143 487 U.S. 589 (1988).

nancy.[144] Even though the terms of the Act did not expressly restrict the funding of religious activity, the Court held that the Act was not unconstitutional on its face.[145] The Court noted that although many of the services to be performed "involve some sort of education or counseling, . . . there is nothing *inherently religious* about these activities."[146] Similarly, the approach to adolescent sexuality and pregnancy favored by the Act, emphasizing self-discipline and adoption, "is not *inherently religious*, although it may coincide with the approach taken by certain religions."[147] The court stated that "the alignment of the statute and the religious views of the grantees [does not] run afoul of our proscription against 'fund[ing] a *specifically religious activity* in an otherwise substantially secular setting.'"[148] The Court explained that "facially neutral projects" such as adoption counseling and educational services are not converted into "[specifically religious] activities by the fact that they are carried out by organizations with religious affiliations."[149]

With respect to the as-applied challenge, the Court remanded the case for determination as to whether any grants had been made to "pervasively sectarian" organizations, or whether any funds had been used for "specifically religious activities" or for "materials that have an explicitly religious content or are designed to inculcate the views of a particular religious faith."[150] But the Court provided little guidance regarding how to make such determinations.[151] As an initial matter, the Court provided no definition of what constitutes a "specifically religious" (or "inherently religious") activity. The Court did state that "evidence that the views espoused on questions such as premarital sex, abortion, and the like happen to coincide with the religious views of the AFLA grantee would not be sufficient to show that the grant funds are being used in such a way as to have a primary effect of advancing religion."[152] However, it did not explain how to distinguish such views from the "views of a particular religious faith."[153]

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144 *Id.* at 593-94.

145 *Id.* at 618.

146 *Id.* at 605 (emphasis added).

147 *Id.* (emphasis added).

148 *Id.* at 613 (citing Hunt v. McNair, 413 U.S. 734, 743 (1973)) (emphasis added).

149 *Id.*

150 *Id.* at 621.

151 Further, although the Court agreed that the record contained evidence of "specific incidents of impermissible behavior by grantees," *id.* at 620, it did not identify the incidents or explain why they were impermissible.

152 *Id.* at 621.

153 Similarly, although the Court stated that the district court, in finding that several grantees were "pervasively sectarian," had not "discuss[ed] with any particularity the aspects of those organizations which in its view warranted classification as 'pervasively sectarian,' *id.* at 620, the

Bowen could be read as distinguishing between the expression of views using "secular" language and the expression of the same views using language that is identifiably religious (e.g., explicit references to religious texts). However, this is precisely the distinction that the Court subsequently rejected as viewpoint discrimination in *Good News Club*.[154] In this regard, it is important to note that the *Bowen* court did not address free speech issues in its analysis; indeed, the case was decided a decade before *Finley* and *Velazquez*. Therefore, the Court had no need to consider how such issues might impact the definition of "inherently" or "specifically" religious activities, or how they might limit the extent to which such expression may be restricted. In fact, these issues dictate a more narrow reading of *Bowen*, one that equates "inherently" or "specifically" religious activities with "exclusively" religious activities.[155]

Nothing in the analysis or holding of the case prohibits such a reading. Indeed, at least one aspect of the opinion supports such a narrow interpretation. In response to the assertion that the challenged statutory program did not contain any "express provision preventing the use of federal funds for religious purposes," the Court observed that it has "never stated that a statutory restriction is constitutionally required."[156] Instead, the Court suggested that the limited purposes for the use of funds set forth in the statute were sufficient to ensure that funds were not used for impermissible religious activities.[157] Since religious expression that furthers these purposes would not be excluded by such a statutory limitation, the Court's analysis implies that only religious expression unre-

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Court did not provide any guidance as to what aspects make a religious organization "pervasively sectarian." The Court merely noted that not all religious organizations are pervasively sectarian. *Id.* at 620 n.16.

154 *See supra* notes 19-28 and accompanying text.

155 The phrase "sectarian worship, instruction, or proselytization" is sometimes characterized as applying to "inherently religious" activities. *See, e.g.*, THE WHITE HOUSE, GUIDANCE TO FAITH-BASED AND COMMUNITY ORGANIZATIONS ON PARTNERING WITH THE FEDERAL GOVERNMENT (2002), *available at* http://www.whitehouse.gov/government/fbci/guidance_document.pdf. Although there does not appear to be any legislative history to support this characterization, it is consistent with the notion that the phrase is intended to reflect Establishment Clause requirements as set forth in *Bowen*. However, the characterization is misleading to the extent it results in a broader restriction of religious expression than that actually required in *Bowen* and permitted in subsequent Free Speech and Free Exercise cases. This article argues that the term "exclusively" religious is a more accurate characterization.

156 Bowen v. Kendrick, 487 U.S. 589, 614 (1988).

157 *Id.* at 614 n.13. In this regard, the Court noted that Congress had "expressed the view that use of funds by grantees to promote religion, or to teach religious doctrines of a particular sect, would be contrary to the intent of the statute." *Id.* at 621-22 (citing S. REP. NO. 98-496, at 10 (1984)). The Court also noted that the Secretary of Health and Human Services had promulgated "a series of conditions to each grant, including a prohibition against teaching or promoting religion." *Id.* Interestingly, the Court stated that "these strictures may not be coterminous with the requirements of the Establishment Clause . . . ." *Id.*

lated to the government's purposes, i.e., exclusively religious expression, is forbidden by the Establishment Clause.[158]

In *Roemer v. Board of Public Works of Maryland*,[159] the Court upheld a grant program that provided general purpose grants to qualifying colleges and universities in the State of Maryland. The grants were subject to the condition that none of the funds could be used for "sectarian purposes."[160] A plurality of the Court held that this restriction was sufficient to ensure that no state funds were being used to support a "specifically religious activity."[161] The plurality then noted that "[w]e have no occasion to elaborate further on what is and is not a 'specifically religious activity,' for no particular use of the state funds is set out in this statute."[162] The plurality merely noted, unhelpfully, that the term "sectarian purposes" is at least as broad as the phrase "specifically religious activity."[163]

In *Tilton v. Richardson*,[164] the Court upheld a program that provided construction grants to institutions of higher education. The program excluded "any facility used or to be used for sectarian instruction or as a place for religious worship, or . . . primarily in connection with any part of the program of a school or department of divinity."[165] The Court stated that these restrictions helped "ensure that the federally subsidized facilities would be devoted to the secular and not the religious function of the recipient institutions."[166] The Court

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158 Similarly, in *Bradfield v. Roberts*, 175 U.S. 291 (1899), the Court sustained a contract between the District of Columbia and a private hospital corporation controlled and managed exclusively by members of a sisterhood of the Catholic Church. The contract, which did not have any restrictions on religious expression or other activities, required the corporation to build and operate an isolation unit for the treatment of patients with infectious diseases sent to the hospital by the District. The District agreed to pay for the construction of the unit and for each patient served, and the hospital was required under its charter to serve all patients. Although the hospital undoubtedly engaged in religious expression while providing services, the Court held that the funding agreement did not violate the Establishment Clause because both the agreement and the corporation were established to further clear secular purposes. *Id.* at 298. The Court noted that "[t]here is no allegation that [the corporation's] hospital work is confined to members of that church or that in its management the hospital has been conducted so as to violate its charter in the smallest degree." *Id.*

159 426 U.S. 736 (1976).

160 *Id.* at 741.

161 *Id.* at 759 (plurality).

162 *Id.* at 760.

163 *Id.* The plurality did express its expectation that the state would "give a wide berth to 'specifically religious activity'" so as to "minimize constitutional questions." *Id.* However, this expectation was not expressed in the context of the religious free speech and viewpoint discrimination cases that followed *Roemer*. *See supra* Part III.

164 403 U.S. 672 (1971).

165 *Id.* at 675 (citing 20 U.S.C. § 751(a)(2) (1964)).

166 *Id.* at 679.

also noted that, according to the record, "some church-related institutions ha[d] been required to disgorge benefits for failure to obey [the restrictions]."[167] However, the Court's opinion does not identify specifically what activities these offending institutions conducted, nor does it otherwise discuss the meaning of the restrictions. As with the cases discussed above, the Court merely concluded that the restrictions are sufficient for Establishment Clause purposes.

Finally, in *Lemon v. Kurtzman*,[168] the Court struck down two programs that provided assistance to secular and religious nonpublic elementary and secondary schools. The assistance consisted of payments for a portion of teacher salaries as well as for certain materials. Both programs contained restrictions on religious content that applied both to the courses taught by teachers receiving salary supplements and to the materials. The Court noted that these restrictions were "precautions taken in candid recognition that these programs approached, even if they did not intrude upon, the forbidden areas under the Religion Clauses."[169] However, because the Court determined that the programs created an excessive entanglement between government and religion, it did not reach the question of whether the restrictions constrain "the principal or primary effect of the programs to the point where they do not offend the Religion Clauses."[170] In short, the Court provided no guidance as to the necessary scope of religious activity restrictions for Establishment Clause purposes.[171]

The fact that the Court has not expressly held that the Establishment Clause requires a broad construction of religious expression restrictions does not, of course, mean that such a construction is not required. Nonetheless, it does leave open the possibility that a narrow construction would satisfy the Establishment Clause, thereby avoiding a conflict between the demands of the Establishment Clause and those of the Free Speech and Free Exercise Clauses. In this regard, it is important to note that the Court has not addressed the question of whether viewpoint restrictions on truly private religious speech and activity are ever justified by the Establishment Clause. In *Good News Club*, the Court stated that "it is not clear whether a State's interest in avoiding an Establishment Clause violation would justify viewpoint discrimination."[172] One reason this is not clear is because the Court has repeatedly held that the expres-

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167 *Id.* at 680.

168 403 U.S. 602 (1971),

169 *Id.* at 613.

170 *Id.*

171 The Court struck down direct monetary grant programs in both *Committee for Public Education v. Nyquist*, 413 U.S. 756 (1973), and *Levitt v. Committee for Public Education*, 413 U.S. 472 (1973). However, the programs at issue in these cases did not have any restrictions on the use of the funds, meaning that the recipients could use the funds for exclusively religious activities.

172 533 U.S. 98, 113 (2001).

sion of religious viewpoints by private individuals does not raise any "valid Establishment Clause interest."[173]

In terms of the Court's doctrine, a narrow construction could reflect the notion that the expression of religious viewpoints or perspectives on government program objectives does not constitute "religious indoctrination," or that (as discussed in the next section) such viewpoints or perspectives are not attributable to the government under religiously neutral government aid programs.

B. *A Narrow Construction Captures All Religious Indoctrination That Could Properly Be Attributable to the Government*

The question of which particular expressive religious activities must be restricted in direct government subsidy programs turns in part on the extent to which any such activities can properly be attributed to the government. In this regard, the Court's cases suggest that in a government program where participants are selected without regard to religion (either expressly or covertly), the only expression that could possibly be attributed to the government is exclusively religious expression outside the scope of the program.

The Court makes clear in *Agostini* that "the criteria by which an aid program identifies its beneficiaries [is relevant to assessing] whether any use of that aid to indoctrinate religion could be attributed to the State."[174] In *Mitchell*, the plurality stated that "the question whether governmental aid to religious schools results in governmental indoctrination is ultimately a question whether any religious indoctrination that occurs in those schools could reasonably be attributed to governmental action."[175] Further, "[i]n distinguishing between indoctrination that is attributable to the State and indoctrination that is not, [the Court has] consistently turned to the principle of neutrality, upholding aid that is offered to a broad range of groups or persons without regard to their religion."[176] In short, if "eligibility for aid is determined in a constitutionally permissible

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[173] *Id.*; *see also* Rosenberger v. Rectors and Visitors of the Univ. of Virginia, 515 U.S. 819 (1995); Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist., 508 U.S. 387 (1993); Widmar v. Vincent, 454 U.S. 263 (1981). In *Widmar*, the Court noted that the state's asserted interest "in achieving greater separation of church and State than is already ensured under the Establishment Clause of the Federal Constitution is limited by the Free Exercise Clause and in this case by the Free Speech Clause as well." 454 U.S. at 276. The limited reach of the Establishment Clause is further demonstrated by the fact that it does not even prohibit certain types of aid for exclusively religious activities in the context of programs or aid generally available to all charitable organizations. *See* Walz v. Tax Comm'n, 397 U.S. 664 (1970) (allowing a property tax exemption based on the conduct of exclusively religious activities where exemptions are also generally available for other charitable organizations and activities).

[174] 521 U.S. 203, 230 (1997).

[175] 530 U.S. 793, 809 (2000) (plurality).

[176] *Id.*; *see also id.* at 838 (O'Connor, J., concurring) ("[N]eutrality is an important reason for upholding government-aid programs against Establishment Clause challenges.").

manner, any use of that aid to indoctrinate cannot be attributed to the government and is thus not of constitutional concern."[177]

Although formal neutrality alone may not be sufficient to ensure that religious indoctrination carried on by funding recipients is not attributable to the government, it at least creates a strong presumption against attribution. In *Board of Regents of University of Wisconsin System v. Southworth*,[178] the Court held that viewpoint neutrality is required in the allocation of funding support to recognized student organizations at a public university.[179] The Court noted that this requirement is consistent with its holding in *Rosenberger* that a public university's "adherence to a rule of viewpoint neutrality in administering its student fee program would prevent 'any mistaken impression that the student newspapers speak for the University.'"[180]

This presumption applies even though the Court has on several occasions cited "'special Establishment Clause dangers' . . . when *money* is given to religious schools or entities directly rather than . . . indirectly."[181] The *Mitchell* plurality explained that "[t]he reason for such concern is not that the form *per se* is bad, but that such a form creates special risks that governmental aid will have the effect of advancing religion (or, even more, a purpose of doing so)."[182] In her concurring opinion in *Mitchell*, Justice O'Connor stated that "the most important reason for according special treatment to direct money grants is that this form of aid falls precariously close to the original object of the Establishment Clause's prohibition."[183] In *Walz v. Tax Commission of New York*,[184] the Court observed that "for the men who wrote the Religion Clauses of the First Amendment the 'establishment' of a religion connoted sponsorship, financial support, and active involvement of the sovereign in religious activity."[185] But the "sponsorship, financial support and active involvement" that was at issue during the Framers' time involved direct monetary grants disbursed on religious criteria specifically to accomplish religious indoctrination.[186] This is a far cry from the

177 *Id.* at 820 (plurality).

178 529 U.S. 217 (2000).

179 *Id.* at 233.

180 *Id.* (quoting *Rosenberger*, 515 U.S. at 841).

181 Mitchell v. Helms, 530 U.S. 793, 818-19 (plurality opinion) (citing *Rosenberger*, 515 U.S. at 842).

182 *Id.* at 819 n.8 (plurality).

183 *Id.* at 856 (O'Connor, J., concurring).

184 397 U.S. 664 (1970).

185 *Id.* at 668.

186 *See* Everson v. Bd. of Educ., 330 U.S. 1, 63-74 (1947) (appendix to opinion of Rutledge, J., dissenting) (providing the text of James Madison's Memorial and Remonstrance against Religious Assessments and the proposed Virginia General Assessment bill); *see also* Douglas Laycock, *The Underlying Unity of Separation and Neutrality*, 46 EMORY L. J. 43, 48-53 (1997).

allocation of aid on nonreligious criteria to accomplish program objectives unrelated to religious indoctrination. In short, although the Court has identified special dangers related to direct monetary grants, it has never indicated exactly how these special dangers affect the analysis of religious indoctrination in a religiously neutral program. Specifically, it has never held that under such programs the nature of the aid alone creates attribution.

The principle that neutrality protects against attribution has been recognized in other contexts. In his *Finley* dissent, Justice Souter argued that "'the communicative element inherent in the very act of funding itself' is an endorsement of the importance of the arts collectively, not an endorsement of the individual message espoused in a given work of art."[187] If the expression of an artist is not attributable to the government when his or her expression is funded by the NEA, which evaluates the quality of each artist's expressive work, then neither is the religious expression of a faith-based social service provider that receives funds without regard to its religious viewpoints.

The foregoing analysis suggests that private religious expression or exercise, even if it in some sense constitutes religious indoctrination, is not attributable to the government if it is conducted in furtherance of the objectives of a religiously neutral program. By way of contrast, religious expression outside the scope of the program could be attributed to the government because the government would have no reason related to the objectives of the program for funding such expression. Of course, these activities would be prohibited by a narrow construction of the religious expression restrictions.

C. *Recent Lower Court Cases Have Not Considered the Distinction Between Narrow and Broad Constructions*

The distinction between narrow and broad constructions of restricted religious expression explains the weakness of several recent lower court cases striking down direct funding of religious organizations. In *DeStefano v. Emergency Housing Group, Inc.*,[188] the Second Circuit held that direct, unrestricted state funding of an organization whose staff members actively supervise Alcoholics Anonymous ("AA") meetings and discuss AA literature with clients violates the Establishment Clause.[189] The court concluded first that AA meetings "are religious as a matter of law" and that the staff's alleged participation "constitutes 'indoctrination.'"[190] The Court then read Justice O'Connor's concurrence in *Mitchell* as generally prohibiting "actual diversion of government

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187 524 U.S. at 611 n.6 (Souter, J., dissenting) (quoting *Rosenberger*, 515 U.S. at 892-93, n.11 (Souter, J., dissenting)).

188 247 F.3d 397 (2d Cir. 2001).

189 *Id.* at 419.

190 *Id.* at 417.

aid to religious indoctrination."[191] Accordingly, the court concluded that "the neutral administration of the state aid program at issue in this case is an insufficient constitutional counterweight to the direct public funding of religious activities alleged by DeStefano."[192]

The holding in *DeStefano* that staff members of a private religious organization can present (or "inculcate") with government funds all perspectives on a program subject (i.e., addiction recovery) except religious perspectives raises precisely the free speech (and free exercise) issues discussed *supra* in Part III. In this regard, it is significant that the court does not appear to have concluded that any of the religious expression was outside the scope of the government program. More to the point, free speech and free exercise issues do not appear to have been before the *DeStefano* court.

These free speech and free exercise issues are particularly significant in light of the fact that the holding is not compelled by Supreme Court precedent. For instance, as discussed *supra* in Part IV.A, there is no support for the court's conclusion that the staff's supervision of AA activities constituted "religious indoctrination" for purposes of the Establishment Clause. Because the Court has never identified any such activities in the context of a direct government aid program, it is apparent that the *DeStefano* court merely assumed, without direct support, that a broad construction of restricted religious expression was required. However, the court could have concluded, consistent with a narrow construction, that the religious perspectives presented in the AA program did not constitute "indoctrination" as that term is used for purposes of the Establishment Clause because the AA program was directed toward the immediate objectives of the program.

Likewise, the court's analysis reads too much into Justice O'Connor's concurrence in *Mitchell.* The court concluded that attribution of religious indoctrination occurs in every instance where direct funding is used for activities that could be characterized as religious indoctrination.[193] In fact, Justice O'Connor merely held that actual diversion of funds to certain (unspecified) religious activities under a formally neutral program may (but does not necessarily) violate the Establishment Clause. In this regard, she noted that the logic of prior cases such as *Agostini* and *Bowen* rested in part upon this proposition, but she did not elaborate on the contours of the proposition.[194] Specifically, she did not identify what types of activities would constitute religious indoctrination for purposes of this rule, nor did she consider the circumstances under which private religious expression in a religiously neutral aid program would be attributed to the gov-

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191 *Id.* at 418 (quoting *Mitchell*, 530 U.S. at 837 (O'Connor J., concurring)).

192 *Id.* at 419.

193 *Id.* at 418.

194 *See Mitchell*, 530 U.S. at 840-41 (O'Connor, J., concurring).

ernment. Instead, she concluded that resolution of these issues was "unnecessary to decide the instant case."[195]

Reading Justice O'Connor more narrowly, the court could have concluded that use of funds to express religious perspectives on social skills development under a religiously neutral program does not result in attribution. This more narrow analysis would have afforded greater respect for the free speech and free exercise rights of the funding recipients.[196]

Essentially the same issues arise in the case of *Freedom From Religion Foundation, Inc. v. McCallum*.[197] In that case, the district court held that the direct, unrestricted government funding of a religious organization that provided various social services from a religious perspective (including an AA program) violated the Establishment Clause.[198] The court concluded that the organization's activities constituted religious indoctrination because its staff members "encourage participants to integrate spirituality into their recovery program."[199] Further, although the organization "may have the secular purposes of providing drug treatment, education and job training, this does not mean that religion does not permeate the programming."[200] Likewise, the court held that the religious indoctrination is attributable to the government when the organization receives unrestricted cash payments from the government without regard to how many recipients enroll in the organization's program.[201] The *McCallum* Establishment Clause analysis closely follows the *DeStefano* analysis, and is therefore subject to the same flaws as those discussed above.[202]

To summarize, the distinction between narrow and broad constructions of religious expression restrictions reveals the unwarranted doctrinal positions taken by the lower courts in the preceding cases. The courts assumed, without support, that the restricted expression includes religious views on topics within

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195 *Id.* at 838. The limits of the Court's analysis regarding the types of private religious expression upon which government funds may not be expended are discussed more fully in Part IV.A *supra*.

196 Alternatively, the case could have been correctly decided on the ground that there were no restrictions against exclusively religious activity outside the scope of the program.

197 179 F. Supp. 2d 950 (W.D. Wis. 2002).

198 *Id.* at 970-71, 978.

199 *Id.* at 969.

200 *Id.*

201 *Id.* at 970-71.

202 *Compare id.* at 966-78 *with supra* notes 188-93 and accompanying text. Essentially the same analysis was also applied by the court in *American Civil Liberties Union of Louisiana v. Foster*, No. 02-1440, 2002 WL 1733651, at *4-*6 (E.D. La. July 24, 2002). The court's reliance upon a broad construction is revealed by its injunction prohibiting the disbursement of funds "to organizations or individuals that convey religious messages or otherwise advance religion in any way in the course of any event supported in whole or in part by [government] funds." *Id.* at *7. The court did not consider the free speech or free exercise implications of this injunction.

the scope of the government programs. In addition, the courts assumed, without support, that all religious expression of private religious organizations will be attributed to the government when the organizations receive direct, unrestricted funding under a religiously neutral program.[203] The very real free speech and free exercise issues raised by the religious expression restrictions do not permit such unwarranted assumptions when alternative interpretations are available that do not infringe on these rights.

D. *A Narrow Construction Is Consistent with Rules Applicable to the Religious Activities of Government Employees*

A narrow construction of the religious expression restrictions is not only consistent with the Supreme Court's cases involving government aid to private organizations, but it is also consistent with the rules governing religious activities conducted by or at the direction (or under the supervision) of government employees. A narrow construction prohibits the type of expressive activities the Court has struck down and allows expressive activity generally permitted for government employees.

The Court has on several occasions held that prayer expressed in public schools by or under the direction of school officials violates the Establishment Clause.[204] Similarly, the Court struck down the practice of Bible reading by students in public schools under the direction of school officials as a devotional exercise.[205] The Court also prohibited a public school "release time" program that allowed students to attend religious instructional classes in a religion of their choice conducted on school premises during school hours, where students not wishing to attend any such class were required to continue with their secular studies during such time.[206] Finally, the Court has struck down state laws requiring the posting of the Ten Commandments on the wall in each public school

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[203] *See also* Freedom From Religion Found., Inc. v. Bugher, 249 F.3d 606 (7th Cir. 2001). In *Bugher*, the Seventh Circuit held that grants to private religious schools under a religiously neutral grant program violated the Establishment Clause because there were no restrictions on the use of the grant funds. *Id.* at 614. Not only did the court rely on an overly broad reading of the law, but it also incorrectly characterized the grants by failing to consider the terms under which they were made. Specifically, the grants were available only for schools having telecommunications contracts for video and data lines and were limited by the amount of such contracts. *Id.* at 609. There is no relevant difference between a reimbursement grant under these conditions and a grant that can only be used for telecommunications expenses.

[204] Engel v. Vitale, 370 U.S. 421 (1962); Lee v. Weisman, 505 U.S. 577 (1992); Santa Fe Indep. Sch. Dist. v. Doe, 530 U.S. 290 (2000).

[205] Sch. Dist. of Abington Township v. Schempp, 374 U.S. 203 (1963).

[206] McCollum v. Bd. of Educ., 333 U.S. 203 (1948).

classroom[207] and requiring the teaching of "creation science" whenever evolution is taught in public schools.[208]

The significance of these cases rests, in part, upon the fact that they each involved religious activity conducted by or under the direction of government employees for what the Court determined to be religious purposes. The activities were not neutral with respect to religion nor did they, according to the Court, further any credible objective unrelated to the advancement of religion.[209] It is also significant that all the cases involved religious activity in public elementary and secondary schools.[210]

Considered in context, the activities struck down in these cases should properly be characterized as exclusively religious activities outside the scope of any permissible government aid program. As such, they would be excluded under a narrow construction of the religious expression restrictions. Accordingly, these cases cannot be read for the proposition that any kind of prayer or religious instruction, regardless of the context in which, or purpose for which, the activity is conducted, constitutes "sectarian worship, instruction or proselytization" under a religiously neutral government aid program. These cases simply do not consider any context even close to such a program.

A narrow construction is also consistent with the rights of government employees to engage in religious expression in their workplace. The *Guidelines on Religious Exercise and Religious Expression in the Federal Workplace*, issued by President Clinton in 1997, ensure that employees can engage in a wide range of religious expression in many situations.[211] For instance, section 1.A(2) of the *Guidelines* states that "[e]mployees should be permitted to engage in religious expression with fellow employees, to the same extent that they may engage in comparable nonreligious private expression."[212] Similarly, section 1.A(3) provides that "[e]mployees are permitted to engage in religious expression directed at fellow employees, and may even attempt to persuade fellow employees of the correctness of their religious views, to the same extent as those employees may engage in comparable speech not involving religion."[213] Further, section 1.A(4) specifies that "in their private time employees may discuss religion with willing coworkers in public spaces to the same extent as they may discuss other subjects, so long as the public would reasonably understand the

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207 Stone v. Graham, 449 U.S. 39 (1980).

208 Edwards v. Aguillard, 482 U.S. 578 (1987).

209 *See, e.g.*, Santa Fe Indep. Sch. Dist. v. Doe, 530 U.S. 290, 306-07 (2000).

210 *See, e.g.*, Good News Club v. Milford, 533 U.S. 98, 115-19 (2001) (discussing Establishment Clause cases considering the impressionability of schoolchildren).

211 *See* WORKPLACE GUIDELINES, *supra* note 5.

212 *Id.*

213 *Id.*

religious expression to be that of the employees acting in their personal capacities."[214]

Because the activities described above are not outside the scope of permissible government activity, they would not be excluded under a narrow construction of the religious expression restrictions. However, a broad construction strictly applied would likely prohibit any employees supported in part by government funding from engaging in any such activity since the activity could arguably be characterized as "sectarian worship, instruction or proselytization." Hence, a broad construction would deny employees of private grant recipients the right to engage in religious expressive activities that are permitted for government employees.

E. A Narrow Construction Minimizes Government Influence on Private Religious Choices

The limited reach of the cases discussed in this part can be explained by the fact that the Establishment Clause, properly understood, acts primarily as a constraint on the government, not on individuals acting in their private capacities.[215] As such, the Establishment Clause is intended to minimize government influence on the religious choices of private individuals and associations. Accordingly, the Establishment Clause is not implicated in situations involving truly private speech where the government has not sought to direct the speech toward or away from religious viewpoints. In this context, the neutrality reflected in a narrow construction of the religious expression restrictions ensures the proper separation between government and religion.[216]

In addition, neutrality with respect to viewpoints in government-funded programs fosters the religious pluralism that lies at the heart of the First Amendment.

> As the domain of government increases in scope, some government involvement in religious activity becomes necessary if religious exercise is to be possible at all. The device of privatizing religion and secularizing government ceases to work as a protection for religious liberty. More sophisticated, and more contentious devices – based on self-conscious religious pluralism even within the public realm – become essential. That is why the old paradigm of "strict separation" under the Establishment Clause has had to give way to ideas such as "equal access," "neutral funding," and "accommodation." If it had not, the expansion of government power, combined with

214 *Id.*

215 *See generally* Carl H. Esbeck, *The Establishment Clause as a Structural Restraint on Governmental Power*, 84 IOWA L. REV. 1 (1988).

216 *See generally* Laycock, *supra* note 186.

> the expansion of government power, combined with the old insistence on "strict separation," would have been a relentless engine of secularization.[217]

One objection to a narrow construction is that it appears to render the religious expression restrictions superfluous. Specifically, some argue that in most government programs, such a construction does not limit the allowable expression any more than the general program conditions designed to ensure that program funds are used only to advance program objectives. But this is not the case. At a minimum, the restrictions help protect against abuse by government administrators and religious organizations with respect to an important constitutional value. Although use of government funds for nonreligious activities outside the scope of a government program violates the program conditions, use for similar religious activities may also violate the Establishment Clause. For this reason, the Court in cases such as *Mitchell* and *Bowen* has looked to the administration of government programs in evaluating potential Establishment Clause violations. There is always a concern that government officials may administer a religiously-neutral program in a way that effectively favors religious organizations. The religious expression restrictions, even narrowly construed, provide a hedge against such impermissible administration.

V. IMPLEMENTATION OF A NARROW CONSTRUCTION

This article argues that religious expression restrictions in religiously neutral government funding programs must be limited to exclusively religious activities that are outside the scope of the program. This approach both respects the free speech and free exercise rights of the participating organizations and addresses the Court's Establishment Clause doctrine with respect to direct funding. To illustrate the practical implications of this approach, the Appendix contains sample regulations related to the religious expression restrictions applicable to the provision of SAMHSA programs.[218] The sample regulations address two key questions for faith-based organizations participating in a SAMHSA program:

> 1. How do the terms "sectarian worship, instruction and proselytization" apply to various types of activities conducted by faith-based organizations? In other words, how can a faith-based organization (and government officials) determine whether any particular expressive activity constitutes "sectarian worship, instruction or proselytization"?

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217 McConnell, *supra* note 77, at 1261.

218 *See* 42 U.S.C. § 300x-65(i) (2000) ("No funds provided through a grant or contract to a religious organization to provide services under any substance abuse program . . . shall be expended for sectarian worship, instruction, or proselytization.").

2. How can a faith-based organization demonstrate that it has not expended any government funds on restricted activities? In other words, what accounting and/or separation principles must be followed with respect to the separate funding of permitted and restricted activities?

The following sections discuss key aspects of the sample regulations as well as additional issues that could be addressed.

A. *Interpretive Principles*

As an initial matter, the regulations clarify that the restrictions are based on an objective assessment of the subject activities and that no consideration is to be given to any internal motivations or underlying purposes of the religious organization. Further, the regulations clarify that the restrictions only apply to exclusively religious activities unrelated to the objectives of the government program. In addition, the regulations clarify that employees of faith-based organizations have at least as much right to engage in religious expression (and in many contexts, a greater right) as government employees in similar positions.

B. *Standards for Separation of Funding*

To the extent that a faith-based organization engages in religious expressive activity that is covered by the religious expression restrictions, the organization must be able to demonstrate that no government funds are expended upon such activities. In *Roemer*, recipient institutions were required to segregate state funds in a "special revenue account" and "to identify aided nonsectarian expenditures separately in [their] budget[s]."[219] The Court held that this was sufficient for Establishment Clause purposes. Accordingly, with respect to SAMHSA funds, faith-based organizations are required to "segregate government funds provided under [a] substance abuse program into a separate account."[220] With respect to such account, such organizations "shall be subject to the same regulations as other nongovernmental organizations to account in accord with generally accepted accounting principles for the use of such funds provided under such program."[221]

It is important to note that a faith-based organization receiving government funds is not prohibited from engaging in "sectarian worship, instruction or proselytization;" the organization merely may not expend government funds on such activities. The charitable choice provisions suggest, appropriately, that the standards governing the separate funding of impermissible religious expressive

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219 Roemer v. Bd. of Pub. Works, 426 U.S. 736, 742 (1976).

220 42 U.S.C. § 300x-65(g)(2) (2000).

221 *Id.* at § 300x-65(g)(1).

activity should mirror the standards governing the separate funding of other nonqualifying activities based on relevant, generally accepted accounting principles. Regulatory guidance applying these standards specifically to the separate funding of restricted religious expressive activity would greatly facilitate the planning and implementation process for faith-based organizations.

C. *Certifications*

Some government programs require faith-based organizations to certify that they will not use funds for certain religious activities.[222] Such certification requirements may have a substantial chilling effect on religious organizations. To the extent that the terms "sectarian worship, instruction, or proselytization" are not adequately defined, a religious organization may have difficulty determining whether certain activities are restricted. The certification requirement increases the effect of this ambiguity by placing the burden of resolving any ambiguity in the meaning of the terms on the religious organization. In this regard, the organization must consider the possibility that it might determine that a particular activity does not constitute "sectarian worship, instruction or proselytization," but that a court may subsequently disagree. In the face of potential liability and ambiguity, a religious organization would have an incentive to construe the restrictions much more broadly than Congress may have intended or than the Establishment Clause may require.

Faith-based organizations should not be required to certify that their activities do not constitute "sectarian worship, instruction, or proselytization." As an alternative, the religious provider could be required to certify that it will not use government funds for activities outside the scope of the program.

D. *Establishment Clause Limitations*

To clarify their intended scope, the religious expression restrictions should be accompanied by a provision stating that the restrictions on religious expression shall only apply to the extent necessary to comply with Establishment Clause requirements. In this way, the restrictions will not serve as an independent limitation on religious expression that is more burdensome than necessary for Establishment Clause purposes.

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222 The applicable provision in H.R. 7, 107th Congress (2001) reads as follows:

> No funds provided through a grant or cooperative agreement to a religious organization to provide assistance under any program described in subsection (c)(4) shall be expended for sectarian worship, instruction, or proselytization. If the religious organization offers such an activity, it shall be voluntary for the individuals receiving services and offered separate from the program funded under subsection (c)(4). A certificate shall be separately signed by religious organizations, and filed with the government agency that disburses the funds, certifying that the organization is aware of and will comply with this subsection.

E. Active Participation in Religious Activities

The charitable choice provisions prohibit a religious organization from discriminating against any individual who receives or applies for services under a government funded program on the basis of "a refusal to actively participate in a religious practice."[223] Regulatory guidance is needed to clarify the extent to which religious organizations may require such individuals to attend program-related meetings where religious practices are conducted, provided that the individuals are not required (or otherwise pressured) to participate in such practices.

VI. SUMMARY

A broad construction of religious expression restrictions in government funded programs assigns religious viewpoints (and the organizations that express such viewpoints) to the margins of society. Indeed, there will be no level playing field in government-funded programs until it is recognized that the Establishment Clause does not require the exclusion of religious perspectives where such perspectives are funded without regard to their religious character. Whether the government proactively adopts this position based on a good faith reading of the Court's Establishment Clause cases (as this article argues it should), or whether this position is forced upon the government by courts enforcing the Free Speech/Free Exercise rights of faith-based organizations, or whether such organizations will continue to be marginalized in government programs, remains to be seen.

223 42 U.S.C. § 300x-65(f).

APPENDIX

Sample Regulations Regarding SAMHSA Religious Expression Restrictions

"No funds provided through a grant or contract to a religious organization to provide services under any substance abuse program . . . shall be expended for sectarian worship, instruction, or proselytization." 42 U.S.C. § 300x-65(i).

1. Definition of Terms

As used in these regulations, and subject to section 2 below:

1.1 The term "sectarian" means religious or related to a particular doctrine regarding the ultimate meaning of life.

1.2 The term "sectarian worship" means ceremonies or practices that render devotion or ascribe worth in accordance with a sectarian belief or set of beliefs.

1.3 The term "sectarian instruction" means teaching or providing information regarding a sectarian belief or set of beliefs.

1.4 The term "sectarian proselytization" means seeking to persuade a person to embrace a sectarian belief or set of beliefs.

2. Interpretive Principles

2.1 Objective Analysis. In determining whether an activity constitutes sectarian worship, instruction or proselytization, no inquiry shall be made into the subjective perspectives or motivations, or the religious doctrine, of the persons involved in such activity. For example, the act of serving the poor and needy shall not constitute sectarian worship merely because the actor believes as a matter of religious doctrine that such an act constitutes worship.

2.2 Exclusively Religious Activities. An activity shall constitute sectarian, worship, instruction or proselytization for purposes of this section only if it is outside the scope of the government funded program. An activity shall be considered to be outside the scope of a government funded program only if the activity is not primarily directed toward any immediate objective of the program or if a similar activity conducted from a purely nonreligious perspective would not qualify for funding under the program.

2.3 Integrated Activities. An activity shall not constitute sectarian, worship, instruction or proselytization for purposes of this section merely because such activity includes religious content or is conducted from a religious perspective, provided the religious content of such activity directly furthers the objectives of the program and the activity as a whole would qualify for funding if conducted from a purely nonreligious perspective.

3. Separation Requirements

3.1 Discrete Activities. Organizations engaging in a discrete activity that constitutes sectarian worship, instruction or proselytization as defined in sections 1 and 2 above must separate the funding of such activity from the funding of activities conducted with government funds. The required separation of funding may be accomplished by any means recognized by GAAP for accounting for the use of separate funds in separate activities. *See* 42 U.S.C. § 300x-65(g)(1); OMB Circular A-102.

3.2 Mixed Activities. Organizations engaging in an activity that includes both qualifying activities and activities constituting sectarian worship, instruction or proselytization as defined in sections 1 and 2 above must maintain separate accounts with respect to the separate activities and all government funds must be allocated to the account of the qualifying activities. The separate accounts must comply with generally accepted accounting principles related to the separate funding of separate activities.

3.3 Integrated Activities. An organization shall not be required to maintain separate accounts or otherwise separately fund religious activities that qualify as Integrated Activities under section 2 above.

3.4 Incidental Religious Activities. An organization need not account for the separate funding of an exclusively religious activity as defined in section B above if the extent of such activity is *de minimis* in nature such that a cost would not normally be allocated to such activity under GAAP.

4. Disclosure of Compliance with Separation Requirements; Disclaimer

The organization must display public notification that SAMSHA funds may not be used for sectarian worship, instruction or proselytization as defined in the applicable regulations and that the funding of any such activities must be

separately accounted for pursuant to such regulations. The notice shall also include the following: "Neither the U.S Government, nor any state or local governmental body, endorses any religious activity conducted by this organization."

5. Limitations on Restrictions

5.1 Private, Voluntary Activities. Nothing in these regulations shall be construed to restrict any beneficiary from voluntarily engaging in activities constituting sectarian worship, instruction or proselytization. Nothing in these regulations shall be construed to restrict any individual involved in providing services from engaging in activities constituting sectarian worship, instruction or proselytization to the same extent that such individuals may engage in other unfunded activities or to the same extent that government employees may engage in such activities.

The *Guidelines on Religious Exercise and Religious Expression in the Federal Workplace*, issued by President Clinton in 1997, ensure that employees can engage in a wide range of religious expression in many situations. For instance, the *Guidelines* state that "[e]mployees should be permitted to engage in religious expression with fellow employees, to the same extent that they may engage in comparable nonreligious private expression." Section 1, Part (2). Similarly, "[e]mployees are permitted to engage in religious expression directed at fellow employees, and may even attempt to persuade fellow employees of the correctness of their religious views, to the same extent as those employees may engage in comparable speech not involving religion." Section 1, Part (3). Further, "in their private time employees may discuss religion with willing coworkers in public spaces to the same extent as they may discuss other subjects, so long as the public would reasonably understand the religious expression to be that of the employees acting in their personal capacities." Section 1, Part (4).

5.2 Establishment Clause Limitation. The restrictions on religious expressive activity set forth in this section are imposed solely for the purposes of complying with requirements of the Establishment Clause as applied to the use of government funds. The restrictions shall not be interpreted to restrict more religious expression than that required by the Establishment Clause. Any restriction not required by the Establishment Clause shall not be valid (except for the requirements in section 4).

6. Examples

6.1 Types of Religious Expressive Activity

6.1.1 *Sectarian Instruction*

a. A religious social services organization that receives government funds for substance abuse counseling provides weekly classes on the theology of its religion. The classes do not address issues related to substance abuse except to an incidental degree. Because these classes are not directed toward the treatment of substance abuse, they constitute "sectarian instruction" under this section.

b. In the course of its counseling program, employees of the religious organization instruct clients that they can experience psychological healing and develop the self-esteem and strength necessary to overcome addiction by relying on the love and forgiveness of God as taught by the organization's religion. Because this instruction is directed toward overcoming substance abuse, it does not constitute "sectarian instruction" under this section.

c. The organization conducts a weekly class on nutrition. The class does not have any identifiably religious content, but the organization believes as a matter of doctrine that the body is the temple of God and that good nutritional practices are a religious duty. The class cannot be characterized as "sectarian instruction" on the basis of this belief.

6.1.2 *Sectarian Worship*

a. A religious social services organization that receives government funds for substance abuse counseling conducts a weekly service open to all employees, volunteers and clients. The service consists of singing, reading and instruction based on sacred texts, and the performance of sacramental activities according to the tenets of the religion. The service only refers to substance abuse issues incidentally (if at all). This service constitutes "sectarian worship" under this section.

b. During counseling sessions, employees of the religious organization pray with clients for strength, peace, forgiveness and healing on issues related to substance abuse. Such prayer does not constitute "sectarian worship" under this section.

c. The religious organization believes as a matter of doctrine that helping people overcome addiction is an act of service to God and a form of worship. The activities of the organization cannot on this basis be characterized as "sectarian worship" under this section.

6.1.3 *Sectarian Proselytization*

a. A religious social services organization that receives government funds for substance abuse counseling conducts weekly meetings open to the public at which participants are instructed in the steps necessary to subscribe to the religion and are encouraged to do so. There are only incidental references to substance abuse issues in these meetings. Because these meetings are not directed toward the treatment of substance abuse, they constitute "sectarian proselytization" under this section.

b. During counseling sessions, employees of the religious organization discuss with clients how subscribing to their religion can facilitate the process of overcoming substance abuse. In addition, employees assist clients who so desire in the process of subscribing to the religion. Such activity does not constitute "sectarian proselytization" under this section.

c. Volunteers of the religious organization spend time helping clients with personal matters as part of the process of overcoming substance abuse issues. The volunteers do not necessarily discuss anything related to religion during these times. However, they believe that process may build the kind of trusting relationship in which an opportunity to discuss religious matters may arise. The time spent by the volunteers with clients cannot be characterized as "sectarian proselytization" based on this belief.

6.2 Separation Requirements

6.2.1 *Discrete Activities.* The weekly services that constitute "sectarian worship, instruction or proselytization" described in subsections 6.1.1(a), 6.1.2(a), and 6.1.3(a) above would be characterized as discrete activities and must be funded from nongovernmental sources according to the rules set forth in section 3.1 above.

6.2.2 *Mixed Activities.* A religious organization conducts weekly staff training sessions, half the time of which is spent on matters related to the treatment of substance abuse. The other half of the time is spent engaged in worship activities unrelated to the treatment of substance abuse. The funding of these sessions must be allocated to government and nongovernment sources according to the rules set forth in section 3.2 above.

6.2.3 *Incidental Activities.* Employees and volunteers of a religious organization occasionally engage in prayer during work hours regarding personal matters, current events, the spiritual well being of clients and

other matters (many of which are unrelated to substance abuse). These prayer times, which are unplanned and of short duration, are similar in scope to discussions of sporting or other events that often occur among employees. Because they are *de minimis* in nature, these activities do not need to be funded separately.

6.3 Limitations

6.3.1 *Activities of Beneficiaries.* During a group session, one client wishes to initiate a conversation on religious matters with another client. Neither client is required to participate in the conversation and may choose not to do so at any time. Such a conversation is not prohibited under these regulations.